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No. 06-242

In The Supreme Court of the United States

MINING AND MINERALS DIVISION OF THE ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT OF THE STATE OF NEW MEXICO and NEW MEXICO ENVIRONMENT DEPARTMENT,

Petitioners,

vs.

EDWINA MANNING AND KIMBERLY DUTTON Personal Representatives of the Estate of Richard Manning, individually, and as community property owners, and d/b/a CHALLENGE MINING COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether constitutional sovereign immunity as recognized by this Court in *Alden v. Maine*, 527 U.S. 706, (1999), protects states from state-court damages actions brought against them under the Takings Clause of the Fifth Amendment of the Constitution as incorporated to the states through the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	21

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES:

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 19, 20

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 9, 10, 11

FMC v. S.C. State Ports Authority, et al., 535 U.S. 743 (2002) 13, 14

Hans v. Louisiana, 134 U.S. 1 (1890) 13, 15, 17

In re Ayers, 123 U.S. 443 (1887) 16

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 11

Palazzolo v. Rhode Island, 553 U.S. 606 (2001) 11

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 11, 13, 14

Tafflin v. Levitt, 493 U.S. 455 (1990) 14

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 11

UNITED STATES COURT OF APPEALS CASES:

Manning v. United States, 146 F.3d 808 (10th Cir. 1998) 4

Santiago v. N.Y. State Dep't of Corr. Servs., 945 F.2d 25 (2nd Cir. 1991) 17

TABLE OF AUTHORITIES – Continued

Page

OTHER CASES:

Boise Cascade Corp. v. State, 991 P.2d 563 (Ore. Ct. App. 1999) 9, 10

Cockrell v. Board of Regents of New Mexico State University, 132 N.M. 156 (2002) 7, 16

Gill v. Public Emples. Ret. Bd., 2004 NMSC 16 14

SDDS, Inc. v. State, 650 N.W.2d 1 (S.D. 2002) 9, 10

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES:

U.S. Constitution Art. I §8 16

U.S. Constitution Art. I §10 6

U.S. Constitution Fifth Amendment ..... *passim*

U.S. Constitution Eleventh Amendment 6, 15

U.S. Constitution Fourteenth Amendment ..... *passim*

28 U.S.C. §1257(a) 2

42 U.S.C. §1983 ..... 5, 10

U.S. Supreme Court Rule 10(c) 20

U.S. Supreme Court Rule 13.1 2

N.M. Constitution Art. II §20 5

New Mexico Statutes Annotated 1978 (as amended) §§69-36-1 to 20 4

New Mexico Statutes Annotated 1978 (as amended) §69-36-2 4

OTHER AUTHORITIES:

The Federalist No. 81 (H. Lodge ed. 1908) (A. Hamilton) 18

PETITION FOR WRIT OF CERTIORARI

Petitioners, the Mining and Minerals Division of the Energy, Minerals, and Natural Resources Department of the State of New Mexico, and New Mexico Environment Department, respectfully pray that a writ of certiorari issue to the New Mexico Supreme Court to review its decision entered in this matter on June 1, 2006.

OPINIONS AND ORDERS BELOW

The New Mexico Supreme Court's opinion in Edwina Manning and Kimberly Dutton, Personal Representatives of the Estate of Richard Manning, individually, and as community property owners, and d/b/a Challenge Mining Company, Plaintiffs-Petitioners v. Mining and Minerals Division of the Energy, Minerals, and Natural Resources Department of The State of New Mexico and New Mexico Environment Department, Defendants-Respondents was entered on June 1, 2006. (App. 2)

The mandate was issued by the New Mexico Supreme Court to the New Mexico Court of Appeals on June 16, 2006. (App. 46)

The writ of certiorari was issued by the New Mexico Supreme Court on May 11, 2004. (App. 44)

The New Mexico Court of Appeals opinion was entered on January 28, 2004. (App. 32)

The Order, granting Defendants' motion for summary judgment on Plaintiffs' Fifth Amendment, Fourteenth

Amendment and Article I Claims Based on Ripeness was entered on July 11, 2002. (App. 41)

JURISDICTION

The New Mexico Supreme Court rendered its opinion on June 1, 2006. (App. 2) Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(a) (1988), and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Fourteenth Amendment, Section 5:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

A mining, milling and smelting operation was conducted by the Mannings on land located in Southwestern New Mexico between 1979 and 1985. Through no involvement of the State of New Mexico or its entities, this operation ceased. The Mannings planned to reopen the operation around 1992. However, the operation did not start again based upon a conflict with the United States Forest Service as to whether the Mannings had submitted a valid plan of operation. This dispute between the Mannings and the federal government escalated and resulted in a lawsuit being filed by Richard Manning. Counterclaims were filed by the government. Pursuant to that litigation, the United States District Court, District of New Mexico, enjoined the operation until such time that the Mannings came into compliance with federal regulations. *Richard Manning v. United States of America,* No. CIV 95-19 BB/LCS. The State of New Mexico and its agencies where not parties to this litigation, nor the events which gave rise to it.

Mr. Manning appealed that decision to the Tenth Circuit Court of Appeals. The Tenth Circuit was unpersuaded by the arguments made by Mr. Manning and upheld the District Court's decision. *Manning v. United States,* 146 F.3d 808 (10th Cir. 1998). Therefore, the injunction remained in place.

The State of New Mexico did not enact the New Mexico Mining Act (the "Mining Act"), until 1993. NMSA 1978, §§69-36-1 to 20 (1993, as amended through 2001). The Mining Act established regulations to "promot[e] responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals." *See* §69-36-2 of *The Mining Act.*

The Mannings subsequently sought to resume their enterprise, and in order to meet federal requirements, the Mannings were instructed by federal officials that they must comply not only with federal standards but also with state regulations promulgated pursuant to the Mining Act. The Mannings alleged that the state agency defendants, who were charged with the statutory obligation of enforcing the Mining Act, enforced various state environmental laws so as to prevent them from carrying on with their contemplated commercial operations. (App. 33)

The Mannings, either unable or unwilling to meet state regulations, embarked on a highly spirited and continuous litigation process against the state agencies. A summary of this litigation history may be of benefit to this Court, as it demonstrates how the Mannings' lawsuit evolved into a direct action claim for damages in state court against the state which resulted in the New Mexico Supreme Court making a determination of unsettled federal law which waived New Mexico's state sovereign

immunity for a Fifth Amendment Takings Claim for damages.

The Mannings filed a Complaint on April 17, 1998, for Inverse Condemnation and alleged that the actions of the State Agencies resulted in regulatory takings in violation of Article II, §20 of the New Mexico Constitution. The state agencies filed a motion to dismiss arguing that the Mannings were prohibited from bringing an inverse condemnation action because the state agencies lacked the power of eminent domain. The New Mexico Seventh Judicial District Court dismissed the Complaint for Inverse Condemnation without prejudice, granted leave to the Mannings to file an amended complaint, and certified the underlying legal question for interlocutory appeal. The New Mexico Court of Appeals denied the interlocutory appeal.

On April 6, 1999, the Mannings filed a First Amended Complaint. In addition to bringing a regulatory takings claim pursuant to the New Mexico Constitution, the Mannings added a Fifth Amendment Takings Claim and a Fourteenth Amendment Due Process Claim brought pursuant to 42 U.S.C. §1983.

On May 5, 1999, the state agencies removed the First Amended Complaint to the United States District Court for the District of New Mexico. Thereafter, the state agencies filed a motion to dismiss. The state agencies sought dismissal of the Section 1983 claims, as the Mannings had failed to name any state official as an individual defendant, and based on well established case law the state agencies were not by definition a "suable person" pursuant to 42 U.S.C. §1983.

Thereafter, the Mannings filed a motion for remand to state court which was granted. The federal court held that because the state had asserted Eleventh Amendment immunity the federal court lacked subject matter jurisdiction to entertain the action. The remand order also found, "the MMD and NMED may not have the authority to take actions that would constitute an 'extraordinarily effective waiver' of the State's Eleventh Amendment Immunity." *Manning v. Mining and Minerals Division et al.*, CIV 99-507 JHG/LFG. (App. 48)

The Mannings then filed in state court a Second Amended Complaint wherein they abandoned their Section 1983 claims, but asserted that the actions of the state agencies (1) constituted a regulatory taking of Plaintiffs' property in violation of the Fifth Amendment of the United States Constitution; (2) deprived Plaintiffs of their right to due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and (3) substantially impaired Plaintiffs' contractual relationship in violation of the Contract Clause of Article I, Section 10 of the United States Constitution. (App. 33) These direct action federal constitutional claims were brought solely against the state agencies and sought monetary damages.

The state agencies moved for summary judgment on several grounds, including ripeness and sovereign immunity. The district court granted summary judgment in favor of Defendants based on ripeness on July 11, 2002. (App. 41)

Plaintiffs' appealed the decision to the New Mexico Court of Appeals. After the appeal was briefed and assigned to a panel, the Court of Appeals sua sponte

requested supplemental briefing to address the constitutional sovereign immunity issue based on this Court's decision in *Alden v. Maine,* 527 U.S. 706 (1999), and a similar New Mexico Supreme Court holding in *Cockrell v. Board of Regents of New Mexico State University,* 132 N.M. 156, 45 P.3d 876. (App. 34)

Relying upon this Court's holding in *Alden,* the New Mexico Court of Appeals on January 28, 2004, concluded that, "federal law does not override New Mexico's sovereign immunity from suit on the federal constitutional claims asserted by Plaintiffs." (App. 40) The Court of Appeals did not address the state district court's ripeness dismissal.

Pursuant to a Writ of Certiorari, the New Mexico Supreme Court reviewed the Court of Appeals decision, and arrived at a far different result.

The New Mexico Supreme Court held in its June 1, 2006, opinion, "We granted certiorari to address an issue of first impression: whether state constitutional sovereign immunity bars the rights and remedies found in the Takings Clause and the Contracts Clause of the United States Constitution when those rights and remedies are asserted against a state agency. Concluding that such claims are barred under the Contracts Clause, but not the Takings Clause, we affirm in part, reverse in part, and remand for further proceedings (regarding ripeness)." (App. 2)

The New Mexico Supreme Court entered the mandate regarding its opinion on June 16, 2006. (App. 46)

REASONS FOR GRANTING THE PETITION

I. The New Mexico Supreme Court's decision that constitutional sovereign immunity is waived for damages actions brought against the state under the Takings Clause raises important and incompletely resolved issues of constitutional structure and federalism.

"Although the federal constitution establishes a national government with broad, often plenary, authority over matter within its recognized competence, the founding document specifically recognizes the states as sovereign entities," *Alden v. Maine,* 527 U.S. 706, 713 (1999). The New Mexico Supreme Court's decision alters the constitutional structure and advances federalism by waiving fundamental state constitutional immunity that has been in place since the founding of this country.

Alden recognized that the federal system established by the federal constitution preserved the sovereign status of the states in two distinct ways, "First, it reserves to them a substantial portion of the nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The states form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere. Second, even as to matters within the competence of the national government, the constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the state and federal governments would exercise concurrent authority over the people who are the only proper objects of government," *Id.* at 714 (internal cites omitted).

This Court has left unresolved whether a state waives its constitutional sovereign immunity if a direct action claim for damages is brought against the state in state court pursuant to the Fifth Amendment Takings Clause. This issue is an important and unsettled question of federal law that requires resolution by this Court.

The New Mexico Supreme Court candidly admitted that the resolution of this constitutional question was a matter of "first impression," in deciding the issue of "whether state constitutional sovereign immunity bars the rights and remedies found in the Takings Clause and the Contracts Clause of the United States Constitution when those rights and remedies are asserted against a state agency." (App. 2)

Only two other state appellate courts post-*Alden* have interpreted the Takings Clause in a similar manner. *Boise Cascade Corp. v. State,* 991 P.2d 563 (Ore. Ct. App. 1999); *SDDS Inc. v. State,* 650 N.W.2d 1 (S.D. 2002). However, an examination of those state appellate decisions show they are fundamentally flawed. In *Boise Cascade,* the Court simply relied on *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), without any further analysis, and it explicitly rejected any consideration of how *Alden* impacted the analysis. Also, of importance, is that *First English* was not an action against a state, and therefore not on point. The governmental entity in *First English* was a county, which this Court has consistently determined is not protected under traditional concepts of sovereign immunity. *Alden* makes clear that a state's sovereign immunity bars suits against the state itself, but not "lesser entities," and that "immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which

is not an arm of the state." *Id.* at 756. Meanwhile, in *SDDS Inc.*, the Court summarily adopted the reasoning of *Boise Cascade* without independent analysis. In both decisions, those state courts provided only a cursory review of constitutional sovereign immunity, and primarily relied on the footnote in *First English* to justify their holdings without further examination. In *Boise Cascade,* the court acknowledged the uncertainty of its decision by stating, "[w]e recognize that our conclusion on this point is not beyond dispute." *Id.* at 123.

Here, the Mining and Minerals Division of the Energy Minerals and Natural Resources Department, and the New Mexico Environment Department are state entities and the claims advanced are brought in state court for damages pursuant to the Fifth and Fourteenth Amendments. The decision of the New Mexico Supreme Court, if left in place, is the most expansive and current state court interpretation of federal law that alters the constitutional structure and advances federalism in a manner not envisioned by the Founding Fathers or by this Court.

In creating this new constitutional damages remedy by waiving state sovereign immunity, the New Mexico Supreme Court has essentially invited aggrieved owners of a property interest to pursue a damages action in state court by filing a direct action claim pursuant to the Fifth Amendment and Fourteenth Amendments. The traditional method of advancing such claims pursuant to 42 U.S.C. §1983, could in many instances, be rendered meaningless. Further, court recognized defenses of qualified immunity may not fit into this expanded federal constitutional litigation against states.

Scrutiny of the decisions rendered by this Court, which were relied upon by the New Mexico Supreme Court, makes apparent the immediate need for this Court to resolve the state sovereign immunity issue, and maintain the constitutional structure and balance between the States and federalism so clearly enunciated in *Alden*.

Not only did the New Mexico Supreme Court, in reaching its decision, ignore the scope of the holdings in *Alden* and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), but substantially expanded the narrow holding by this Court of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), by concluding that because the takings claim is "self-executing" that a damages remedy is available pursuant to a direct claim against the state agency pursuant to the Fifth Amendment. (App. 17)

Again, *First English* serves as a prime example as to why the New Mexico Supreme Court's reasoning is flawed as that lawsuit did not involve a suit against a state or an arm of the state. Therefore, state constitutional sovereign immunity was not applicable. In *First English*, the Supreme Court was not called upon to decide whether a non-consenting state would be immune from a suit seeking just compensation under the Takings Clause. The New Mexico Supreme Court, in reaching its decision that state immunity is abrogated, relied upon the decisions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-30 (1992); *Palazzolo v. Rhode Island*, 553 U.S. 606, 614-15 (2001), and *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306-09 (2002).

Despite substantial reliance on these Supreme Court decisions, the New Mexico Supreme Court conceded that none of these cases specifically addressed the issue of state sovereign immunity. (App. 8, 10) Instead, the New Mexico Supreme Court attempts to discern the "thinking" of this Court as to the meaning of these three decisions as follows: "that these three cases demonstrate the Court's (U.S. Supreme Court's) thinking, and inform our own on that subject, because in each case the possibility of a compensatory claim against the state was at the center of the controversy." (App. 8) The New Mexico decision is based on the premise that this Court had the opportunity to decide these cases based on a state's constitutional sovereign immunity and did not. From this, the New Mexico Supreme Court wrongfully concluded that constitutional sovereign immunity was waived.

Indeed, it is a very weak analytical thread that binds and otherwise holds together this case precedent relied upon by the New Mexico Supreme Court to support its decision that the "thinking" of this Court was to waive state inviolate constitutional sovereign immunity that has existed since the founding of this country.

II. The New Mexico Supreme Court's decision conflicts with the reasoning of this Court's recent constitutional sovereign immunity decisions and attempts to limit *Alden v. Maine* to federal statutory causes of action.

Even though this Court has never expressly ruled on this issue, the reasoning in *Alden,* and other related cases, strongly indicate that the Takings Clause should not be an exception to the general rule that the States are cloaked

with sovereign immunity as to these types of direct action constitutional claims for damages.

In the seminal holding in *Alden*, this Court rejected the concept that "substantive federal law, by its own force, necessarily overrides the sovereign immunity of the States." *Id.* at 732. Further, this Court did not limit its analysis to federal statutes as implied by the New Mexico Supreme Court. Rather, this Court noted that it previously had sustained a state's immunity "in a private suit arising under the Constitution itself." *Alden* at 732 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890).

In 2002, this Court had another opportunity in *FMC v. S.C. State Ports Author.*, 535 U.S. 743 (2002), to clarify and revisit the doctrine of constitutional sovereign immunity. This Court determined: "[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit" *Id.* at 766. Thus, sovereign immunity applies "regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief." *Id.* at 765.

Additional authority that there is no waiver of state constitutional sovereign immunity is found in *Seminole Tribe of Florida v. Florida, supra.*

> Courts have understood U.S. Const. Amend. XI, to stand not so much for what it says but for the presupposition which it confirms. That presupposition, has two parts: first, that each state is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. Federal jurisdiction over suits against unconsenting states was

> not contemplated by the U.S. Constitution when establishing the judicial power of the United States. *Id.* at 53.

Constitutional sovereign immunity is derived from both the U.S. Constitution and recent U.S. Supreme Court precedent. It deals with the circumstances in which private suits under federal law may be brought against a state. *See Gill v. Public Emples. Ret. Bd.*, 2004-NMSC-16, ¶ 1, 90 P.3d 491, 493-94. "Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *FMC v. S.C. State Ports Authority, et al.*, 535 U.S. 743, 751 (2002). Upon ratification of the Constitution, the States entered the Union with their sovereignty intact. *See Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991). Therefore, the States possess sovereignty concurrent with the sovereignty of the Federal Government. *See Tafflin v. Levitt,* 493 U.S. 455, 458 (1990). An integral component of the sovereignty retained by the States is their immunity from private suits. *See FMC,* 535 U.S. at 752.

In 1999, this Court in *Alden,* identified and recognized the inviolate principles of Constitutional sovereign immunity. In *Alden,* the plaintiffs filed suit in federal court against the State of Maine for a violation of the Fair Labor Standards Act and sought damages. *See id.* at 711-12. While the suit was pending, the U.S. Supreme Court issued *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), and held that Congress lacked the power under Article I to abrogate the States' sovereign immunity from suits in federal courts, and Congress only had authority to abrogate the States' sovereign immunity under §5 of the Fourteenth Amendment. *See id.* at 712. Consequently, the federal court dismissed the lawsuit, whereupon plaintiffs filed the same action in state court. *See id.*

Based on this procedural posture, this Court in *Alden* was called upon to determine whether Congress has the power under Article I to subject non-consenting States to private suits in their own courts. *See id.* at 730. In order to reach this issue, the Court began with a detailed and scholarly analysis of how constitutional sovereign immunity differs from Eleventh Amendment immunity and common law immunity. *See id.* at 713, 733. Rather, "the structure and history of the [U.S.] Constitution make clear that [sovereign] immunity exists today by constitutional design." *Id.* at 733.

Summarizing the foundation of constitutional sovereign immunity, this Court turned to the specific issue of whether Article I abrogates the constitutional sovereign immunity of the States. The Court rejected the argument that Article I abrogates constitutional sovereign immunity and allows Congress to subject the nonconsenting States to private suits. *See id.* at 732. Rather, the Court held that the "States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Id.* at 754.

In *Alden,* this Court rejected the concept that "substantive federal law by its own force necessarily overrides the sovereign immunity of the States." *Alden,* 527 U.S. at 732. Further, this Court did not limit its observation to federal statutes as implied by the New Mexico Supreme Court. Rather, this Court noted that it previously had sustained a state's immunity "in a private suit arising under the Constitution itself." *Alden,* 527 U.S. at 732 (*citing Hans v. Louisiana*, 134 U S. 1 (1890)).

Accordingly, the dual sovereignty of the States and the Federal Government has given rise to constitutional

sovereign immunity. Cloaked with constitutional sovereign immunity, the States should not be "summoned as defendants to answer the complaints of private persons . . . and controlled by the mandates of judicial tribunals without their consent, and in favor of individuals interests." *In re Ayers*, 123 U.S. 443, 505 (1887).

In order to abrogate constitutional state sovereign immunity as defined in *Alden*, the New Mexico Supreme Court attempted to distinguish the *Alden* holding by casting the constitutional question as follows, "The question in this case, however, differs from that in *Alden* and *Cockrell*. Here, the questions focused on a form of monetary relief – "just compensation" for a taking – that is not the result of congressional action under Article I." (App. 13)

The New Mexico Supreme Court continued, "*Alden*, therefore, lends encouragement to the concept before us now that a right and a remedy textually rooted in the Constitution supersedes or 'trumps' state constitutional sovereign immunity, although Congressional remedies fashioned under the Commerce Clause powers of Article I, Section 8, do not." (App. 15)

The New Mexico Supreme Court determined that the Framers of the Constitution intended that a remedy for Takings compensation was to be applied to the states through Section 1 of the Fourteenth Amendment. Further, the New Mexico Supreme Court held that the Takings Clause is self-executing, at least as applied to the states through the Fourteenth Amendment. The New Mexico Supreme Court concluded, "We have found no judicial opinion specifically holding that it is not self-executing, and no case has held that to apply the Takings Clause to

the states requires congressional action under Section 5 of the Fourteenth Amendment." (App. 25)

However, the New Mexico Court of Appeals correctly analyzed whether the Takings Clause of the Fifth Amendment even directly applied to the states when it stated:

> "The Takings Clause of the Fifth Amendment does not directly apply to the states. *Barron v. Mayor and City Council of Baltimore,* 32 U.S. (7 Pet.) 243 (1833). It applies to the states through the Due Process Clause of the Fourteenth Amendment, *First English,* 482 U.S. at 310 n.4; *see also* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 523 (3d ed. 1999). Even if we assume that the self-enforcing character of the remedy afforded by the Takings Clause allows Plaintiffs to plead a damages claim directly under the Fifth and Fourteenth Amendments, Plaintiffs still must overcome New Mexico's sovereign immunity. Plaintiffs face "[t]he logical implication from *Quern* . . . that if §1983 did not abrogate traditional [sovereign] immunity, Section 1 of the Fourteenth Amendment by itself surely does not otherwise there would have been no sovereign immunity left intact for Congress to have failed to abrogate when passing §1983 in 1871." *Santiago v. N.Y. State Dep't of Corr. Servs.,* 945 F.2d 25, 31 (2d Cir. 1991).

In stark contrast to its holding regarding the Fifth Amendment Takings Claim, the New Mexico Supreme Court correctly determined that state constitutional sovereign immunity was not waived with respect to the Mannings' Contract Clause Claim. The Court held, "The Supreme Court's interpretation of *Hans* and *Alden* makes

clear that the Mannings' Contract Clause claim is barred by sovereign immunity because the Contracts Clause does not provide for claims for money damages. We have found no authority to the contrary. In that respect, the Contracts Clause differs from the Takings Clause because only the latter contains its own remedy enforceable upon all those who take property without just compensation." (App. 27)

III. The New Mexico Supreme Court decision is contrary to public policy.

The "attributes of sovereignty" are "enjoyed by the government of every State in the Union." The Federalist No. 81, p. 508 (H. Lodge ed. 1908) (A. Hamilton). Inherent in this sovereignty is the right of every state "not be amenable to the suit of an individual without its consent." *Id.* "Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . " *Id.*

As reflected in these time honored principles etched in American history, the U.S. Constitution "was understood, to preserve the State's traditional immunity from private suits." *Alden* at 724. This fundamental and traditional immunity, as embraced by the U.S. Constitution, has been referred to as constitutional sovereign immunity, and it affords the states the right to assert immunity from private suits for damages arising directly under federal law. *See id.* at 732. Unless the states have already surrendered this immunity by constitutional design, the express consent of the sovereign is required in order to abrogate constitutional sovereign immunity.

There exists a strong public policy, as reinforced by the case law and grounded in United States history, to

preserve state constitutional sovereign immunity. This was not done here. Neither the Takings Clause of the Fifth Amendment nor the Due Process Clause of the Fourteenth Amendment require New Mexico to abrogate its constitutional sovereign immunity in this instance.

IV. The New Mexico Supreme Court decision is ripe for review.

Immediate review at this time by this Court is favored based on the factors set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), where this Court identified four categories of cases where this Court has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. These four categories are as follows and all are applicable here:

> (1) "Cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where, for one reason or another, the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final."
>
> (2) Cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."
>
> (3) Cases in which "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."

> (4) Cases in which "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review" might prevail on nonfederal grounds, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state-court decision might seriously erode federal policy."

"For all practical purposes," the federal issue has been decided by the highest court in the State of New Mexico. Regardless of the ultimate determination by the state court on the ripeness issue, the constitutional decision by the New Mexico Supreme Court will stand and "later review of the federal issue cannot be had," as noted in *Cox*. Hence, reversal of the state court on the federal issue "would be preclusive of any further litigation on the relevant cause of action." *Id.* Refusal to immediately review the New Mexico Supreme Court's decision will seriously erode fundamental concepts of federal policy, states rights and historically recognized state sovereign immunity.

Pursuant to Supreme Court Rule 10(c), review on a writ of certiorari should be granted as, "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment and opinion of the New Mexico Supreme Court.

Respectfully submitted,

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August 16, 2006

90 P.3d 506

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: ___

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NO. 28,500

EDWINA MANNING AND KIMBERLY DUTTON, Personal Representatives of the Estate of Richard Manning, individually, and as community property owners, and d/b/a CHALLENGE MINING COMPANY,

Plaintiffs-Petitioners,

v.

MINING AND MINERALS DIVISION OF THE ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT OF THE STATE OF NEW MEXICO and NEW MEXICO ENVIRONMENT DEPARTMENT,

Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
John W. Pope, District Judge

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OPINION

(Filed Jun. 01, 2006)

BOSSON, Chief Justice.

{1} Plaintiffs, owners of a mining property in southwestern New Mexico, claim their land interest has been effectively "taken" from them through application of state mining regulations without the payment of just compensation. They also argue that the State has impaired their contractual obligations in violation of the Contracts Clause. The Court of Appeals held that Plaintiffs' compensatory claims against two state regulatory agencies are barred by state constitutional sovereign immunity. We granted certiorari to address an issue of first impression: whether state constitutional sovereign immunity bars the rights and remedies found in the Takings Clause and the Contracts Clause of the United States Constitution when those rights and remedies are asserted against a state agency. Concluding that such claims are barred under the Contracts Clause, but not the Takings Clause, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

{2} Plaintiffs, the Manning family,[1] own land in southwestern New Mexico which was used for mining, milling and smelting operations. The mine operated between 1979 and 1985, and then was shut down. In 1992, the Mannings began to prepare the mine to reopen.

{3} Then, in 1993, prior to the mine being reopened, the State passed the New Mexico Mining Act (the "Mining Act"). NMSA 1978, §§ 69-36-1 to -20 (1993, as amended through 2001). The Mining Act increases mining regulation to "promot[e] responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals." Section 69-36-2. The New Mexico Mining and Minerals Division of the Energy, Minerals, and Natural Resources Department and the New Mexico Environment Department (the "State agencies") are the agencies responsible for enforcing the Mining Act. *See* § 69-36-14.

{4} The Mannings have a long, litigious history regarding the application of the Mining Act to their property. In this lawsuit the Mannings claim they cannot determine the bonding and reclamation requirements for the mine unless they are allowed to operate, and yet state regulations will not allow them to operate without first meeting reclamation requirements. Thus, the Mannings argue that the State agencies have effectively taken their property, making it impossible to mine, without justly compensating them. They also argue that these uncertainties, and the additional expenses required under the Mining Act, have

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[1] Richard Manning, who originally brought this action, has since passed away and Kimberly Dutton has been substituted as personal representative of the Estate of Richard Manning.

prevented them from meeting their contractual obligations and entering into new contracts. The Mannings request compensation for their loss in the amount of $6,500,000.00, plus interest.

{5} In the district court the State agencies moved for summary judgment based on both ripeness and constitutional sovereign immunity. Without addressing immunity, the district court granted summary judgment on the basis of ripeness, concluding that the Mannings' difficulties in operating the mine were due to other legal issues that predated the state regulatory scheme. The Court of Appeals affirmed, but based its holding solely on sovereign immunity. *Manning v. Mining & Minerals Div. of the Energy, Minerals, & Natural Res. Dep't*, 2004-NMCA-052, ¶ 1, 135 N.M. 487, 90 P.3d 506. We granted certiorari to analyze the sole question of whether constitutional sovereign immunity bars the Mannings' Takings and Contracts Clause claims. We do not address whether the Mining Act, as applied to the Mannings, constitutes a regulatory taking, nor do we address the issue of ripeness.

DISCUSSION

{6} The proper division of power between state and federal governments is a debate that has waged since the founding of this nation. James Madison highlighted the debate in The Federalist Papers, pointing out the potential dangers of a centralized federal government to the states. THE FEDERALIST NO. 39, at 256-63 (James Madison) (M. Walter Dunne ed. 1901) (adoption of republican principles in the new Constitution), NO. 45, at 314-20 (discussion of possible dangers to state governments from the federal government), NO. 46, at 321-28 (comparison of the powers

of the state and federal government). Ultimately, states ceded their autonomy as part of a balanced, federalist system in which they retained a level of sovereignty, including a corresponding level of sovereign immunity.

{7} The degree of immunity retained by the states today is one outcome of this historical debate over the balance of power between the states and the federal government. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 398-400 (4th ed. 2003) (discussing the sovereign immunity debates at the state ratification conventions). Under the Eleventh Amendmeent,[2] the doctrine of constitutional sovereign immunity historically barred individual claims against a state when brought in federal court. *See Alden v. Maine*, 527 U.S. 706, 730 (1999). Since the United States Supreme Court's holding in *Alden*, constitutional sovereign immunity may also bar certain individual claims for damages against a state in state court. *See id.* at 728; *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶¶ 1, 14, 132 N.M. 156, 45 P.3d 876 (state constitutional sovereign immunity bars an individual claim for monetary damages under the Fair Labor Standards Act filed against the state in state court).

{8} As will be further discussed in this opinion, the effect of *Alden*, if any, upon claims filed in state court under the Takings and Contracts Clauses lies at the heart of this controversy. Before analyzing *Alden* in detail, however we begin our analysis by reviewing the Takings Clause and its history of enabling claims similar to those brought by

[2] "The Judicial power to the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. CONST. amend. XI.

the Mannings in this case. We will then separately address the Contracts Clause claim.

Standard of Review

{9} Whether constitutional sovereign immunity can shield a state, in state court, from claims based on the Takings and Contracts Clauses is an issue of law we review *de novo*. *Hasse Contracting Co. v. KBK Fin., Inc.*, 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641.

Takings Clause Claims Against State Governmental Agencies

{10} The Takings Clause is found in the Fifth Amendment to the United States constitution and prevents the government from taking private property, overtly or through regulation, without justly compensating the lawful owner. U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation,"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). As an essential element of individual liberty, the Takings Clause was included in the Bill of Rights to ensure the protection of private property from an overreaching government. *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 512-13 (2004) (James Madison's intent in drafting the Fifth Amendment was to protect individual property rights in the Constitution based on the belief that such individual rights may not be adequately protected by the political process). The constitutional framers selected just compensation as their specific remedy for enforcement of that

right. *See generally Cannon v. State*, 807 A.2d 556, 566-69 (Del. 2002) (Holland, J., dissenting) (discussing the early origins of the Takings Clause and the purpose behind its incorporation into the Bill of Rights) (citing JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998)).

{11} For over a century, the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment's guarantee of due process. *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235-42 (1897). In regard to the Takings Clause, the state must provide a "reasonable, certain and adequate provision for obtaining compensation," both when property is physically taken as well as when a regulation greatly reduces the economic viability of the property. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (quoted authority omitted).

{12} Historically, the United States Supreme Court has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause for just compensation. Three such cases merit discussion.

{13} In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-30 (1992), a landowner brought a takings claim against the state agency responsible for implementing regulations that restricted private development on state beaches to prevent beach erosion. The Supreme Court held that the state could be held accountable to the owner for just compensation if, on remand, the state court found that the development regulations were restrictive enough to amount to a taking of the beachfront property. *Id.* at 1027-28.

{14} A second case, *Palazzolo v. Rhode Island*, 533 U.S. 606, 614-15 (2001), also involved restrictions on development of beachfront property, this time due to regulations protecting salt marshes and other coastal areas from environmental damage. In remanding the case to examine the takings question, the Supreme Court tacitly assumed, as in *Lucas*, that the landowner could sue the state for just compensation in the event the development regulations were so restrictive that they amounted of a taking. *Palazzollo*, 533 U.S. at 632.

{15} Most recently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306-09 (2002), the takings claim was brought against an interstate regional planning agency, created by legislation in both California and Nevada, and comprised of individuals from both states. After the planning agency imposed a moratorium on development around Lake Tahoe to protect its crystalline waters, landowners sued the planning agency alleging a taking and demanding just compensation. *Id.* at 307-14. Although the Court held that the moratorium did not constitute a taking in this instance, it also set forth the analysis to be applied in temporary taking situations as the one described. *Id.* at 341-42.

{16} Even though the Supreme Court did not explicitly address the issue of state sovereign immunity, these three cases demonstrate the Court's thinking, and inform our own on that subject, because in each case the possibility of a compensatory claim against the state was at the center of the controversy. And these three recent opinions do not stand alone. Even before *Lucas*, the Supreme Court suggested that the Takings Clause provides a justiciable remedy for individuals to assert against the state in state court.

{17} In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 n.9 (1987), the Supreme Court suggested that the Fifth Amendment's Takings Clause trumps state sovereignty. *See generally* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-38, at 1272 (3d ed. 2000) (suggesting that based on *First English* the Takings Clause "trumps state (as well as federal) sovereign immunity"). The Court made clear that "the compensation remedy is required by the Constitution," and rejected the argument that the Takings Clause could only be enforced by injunctive relief. *First English*, 482 U.S. at 316[3]

{18} Applying this constitutional framework to the case before us, we acknowledge the close resemblance between the Mannings' situation and the facts in *Lucas*, *Palazzolo*, and *Tahoe*. Like the property owners in each of these cases, the Mannings are contending with state agencies responsible for implementing legislation intended to protect land from certain uses. In the Mannings' case, the regulations require that owners of existing mines complete an in-depth mining operation site assessment, including certain reclamation requirements. *See* § 69-36-7. These regulations are intended to ensure that mine owners properly reclaim land that has been mined. Section 69-36-2. Looking not to the merits of their takings claim, but to

[3] In a later case, a plurality of the Supreme Court noted it was not yet decided if sovereign immunity was a bar to Takings Clause claims. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714 (1999) (plurality opinion) (citing *First English*, 482 U.S. at 316, n. 9). *See generally* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1077 (2001) (arguing that the Supreme Court has left the issue open).

the broader question of whether the Mannings may even assert such a claim in state court, this precedent from the United States Supreme Court strongly suggests that the court below erred in rejecting the Mannings' claim.

{19} Importantly, New Mexico constitutional and statutory law also supports the proposition that sovereign immunity does not bar takings claims when asserted against the state for just compensation, at least in certain situations. Both the constitution and laws of New Mexico include provisions requiring just compensation when the state takes private property for public use. N.M. CONST., art. II, § 20 ("Private property shall not be taken or damaged for public use without just compensation."); NMSA 1978, § 42A-1-29 (1981) (authorizing inverse condemnation proceedings against any government agency of the state that is authorized to exercise eminent domain). Although these legal authorities do not apply directly to the Mannings' case, because this is not an instance of eminent domain, they nonetheless demonstrate that the State provides compensation under similar circumstances, and can be sued in state court if it does not.[5] Sections 42A-1-23, -29; *see also* Seaman, *supra,* at 1118 n.249 (arguing that New Mexico has waived its immunity from certain just compensation suits through its enactment of these laws).

{20} In response, the State argues a radical position that creates a paradox. The State acknowledges that if a state agency has the power of eminent domain, like the Transportation Department, then the State must provide just

[5] The Mannings originally attempted to bring their claim under Section 42A-1-29. That claim was dismissed because the State agencies here do not have a statutory grant of eminent domain power. Thus, the claim did not fall under the provisions of Section 42A-1-29.

compensation for a taking. However, if the agency is not given the power of eminent domain, like the agencies here, but is guilty of a regulatory taking like that alleged by the Mannings, then the private individual is without a remedy in state court, even though both the State and Federal Constitutions obligate the State to pay.

{21} We are not suggesting that the legislature cannot prescribe terms and conditions that govern recovery under the Takings Clause, such as Section 42A-1-29. When a statutory framework provides for recovery, individuals must abide by it. However, such legislation cannot insulate the state from providing just compensation for takings that do not involve formal eminent domain powers, which is the effect of Section 42A-1-29. Holding otherwise would expose more citizens to takings without adequate compensation, contrary to the protections our Constitution provides. When a taking occurs, just compensation is required by the Constitution, regardless of state statute. *See First English,* 482 U.S. at 321 ("where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective").

{22} If we were to relieve the state from paying for takings when agencies do not have statutory eminent domain authority, then paradoxically we would bar practically every regulatory taking claim against a state agency. A regulatory takings claim, by definition, does not invoke eminent domain powers because the state claims only to regulate the use of land and not to condemn its title. But the protections of the Fifth Amendment do not rest on such formalistic distinctions. A regulatory taking can be just as devastating to property rights as a taking by

eminent domain, and the right of the landowner to compensation is just as central to the promise of the Bill of Rights in either instance.

The State's Argument Under *Alden v. Maine*

{23} In the face of so much authority favoring the Mannings' position, the State agencies base their argument primarily on *Alden*, 527 U.S. 706 (1999), and the shift in federalist principles discussed in that opinion. The critical question for this Court is whether *Alden* even applies. To answer that question, we must resolve what effect, if any, *Alden* has when immunity is asserted against claims for just compensation that are brought directly under the text of the Fifth Amendment, as opposed to claims for damages under statutory rights created by Congress. Accordingly, we turn to an analysis of *Alden* in light of the Mannings' claim.

{24} *Alden* and its progeny stand for the proposition that state constitutional sovereign immunity bars individual claims for damages that are based on legislation passed by Congress pursuant to its Article I powers. *Alden*, 527 U.S. at 754; *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 59 (1996); *see also Gill v. Pub. Employees Ret. Bd.*, 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491 (discussing the holding in *Alden* while evaluating a claim for injunctive relief asserted against the State under the federal Age Discrimination in Employment Act); *Cockrell*, 2002-NMSC-009, ¶¶ 14-15 (holding that sovereign immunity barred a post-*Alden* claim under the Fair Labor Standards Act for money damages asserted against the state in state court). Specifically, the issue in *Alden*, 527 U.S. at 711-13, was whether an individual's claim for damages against the

state, under the Fair Labor Standards Act (FLSA), filed in state court, was barred by sovereign immunity. Congress passed the FLSA under the constitutional authority of the Commerce Clause, which is part of the United States Constitution. U.S. CONST., art. I, § 8, cl. 3 ("The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States. . . . "). In *Alden*, 527 U.S. at 754, the Court held that a private individual cannot sue an unconsenting state in state court for money damages under a law created by Congress pursuant to its Article I powers, such as the FLSA. Critical to the holding, the Court determined that the several states did not cede all of their inherent sovereignty, including immunity from suit, simply by adopting Article I of the Constitution. *Id.* The Court concluded that immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.* at 713.

{25} Based on *Alden*, this Court in *Cockrell*, 2002-NMSC-009, ¶ 1, found that New Mexico's constitutional sovereign immunity shielded the state from private FLSA suits brought in state court. We held that New Mexico did not waive its sovereign immunity in regard to the congressionally created remedies found in the FLSA, as the FLSA was created pursuant to Congress' Article I powers. *Id.* ¶¶ 14-15; *see also Gill*, 2004-NMSC-016, ¶ 49 (holding a claim for injunction, but not money damages, against a state officer for a violation of the Age Discrimination in Employment Act, enacted under Article I, Section 8 of the United States Constitution, was not barred by sovereign immunity under the *Ex parte Young* exception).

{26} The question in this case, however, differs from that in *Alden* and *Cockrell*. Here, the question is focused on a

form of monetary relief – "just compensation" for a taking – that is not the result of congressional action under Article I. The Mannings' claim does not rely at all on congressional action. Rather, the just compensation claim stems directly from the text of the Constitution through the Fifth and Fourteenth Amendments. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"). Whereas under Article I Congress is allowed to assert its control over states only to a certain point, rights recognized in the people within the text of the Constitution know no such limitation. And as we shall see, the Court in *Alden* intended no such limitation.

{27} The Court in *Alden*, 527 U.S. at 740, acknowledged the difference between a claim asserted against a state under a congressional statute as opposed to one derived directly from the Bill of Rights. Although sovereign immunity may shield states from liability under certain Article I obligations created by Congress, the balance of power shifts when "the obligation arises from the Constitution itself" *Id.* (distinguishing *Reich v. Collins*, 513 U.S. 106 (1994), from the facts presented in *Alden*); *see also Cent. Virginia Cmty. Coll. v. Katz*, 126 S.Ct. 990, 1004 (2006) (holding that state sovereign immunity did not bar a claim based on bankruptcy proceedings under Article I, Section 8, Clause 4 because "States agreed in the plan of the Convention" to be subject to such suits).[6] The Court in

[6] The opinion in *Katz* is instructive because it discusses *Alden's* limitations. In *Katz* the Court was examining whether sovereign immunity barred actions against the state under the Bankruptcy Clause. 126 S.Ct. at 1004. The Bankruptcy Clause is connected to the Commerce Clause which was at issue in *Alden*. *Katz*, 126 S.Ct. at 1000 n.9. The Court held that based on the Bankruptcy Clause's history,

(Continued on following page)

Alden, 527 U.S. at 713, found that while state constitutional sovereignty is a right the states "retain today," that right can be "altered by the plan of the Convention or certain constitutional Amendments."

{28} *Alden,* therefore, lends encouragement to the concept before us now that a right and a remedy textually rooted in the Constitution supersedes or "trumps" state constitutional sovereign immunity, although Congressional remedies fashioned under the Commerce Clause powers of Article I, Section 8 do not. *Alden*, 527 U.S. at 740; see *also Boise Cascade Corp. v. State ex rel. Or. State Bd. of Forestry,* 991 P.2d 563, 568 (Or. Ct. App. 1999) ("[T]he [Supreme] Court, in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state . . . due to the nature of the constitutional provision involved."). Where failure to provide a remedy is unconstitutional, then under the Fourteenth Amendment's due process guarantee, the State must provide "the remedy it has promised." *Alden,* 527 U.S. at 740. In the Mannings'

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including discussion of it at the Constitutional Convention, along with the limited jurisdiction of the bankruptcy court, the state cannot assert a sovereign immunity defense. *Id.* at 1004-05. The case is distinguishable in that Congress enacted laws under the Bankruptcy Clause, which is not the case here. However, the majority opinion made clear that the question it was addressing was not "whether Congress has abrogated States' immunity," but rather if Congress' decision to subject states to such laws was within its power under the Bankruptcy Clause. *Id.* at 1005. Thus, no explicit waiver of sovereign immunity by Congress was needed because the clause demonstrated that the States consented to suit. *Id.* Justices Thomas, Scalia, Roberts and Kennedy dissented arguing that under *Alden,* and other prior caselaw, it is clear that no Congressional action under Article I can waive sovereign immunity and flat out disagreed that the Bankruptcy Clause itself could have waived sovereign immunity. *Id.* at 1006-08 (Thomas, J., dissenting).

case, the state has failed to provide the remedy of just compensation, "the remedy it has promised" under both the Fifth and Fourteenth Amendments.

{29} In its discussion of *Reich v. Collins,* 513 U.S. 106 (1994), the *Alden* opinion emphasizes the point, central to our case, that failure to provide a promised remedy in the state courts may lead to a violation of due process. 527 U.S. at 740. In *Reich,* 513 U.S. at 108-09, the petitioner brought suit against the State of Georgia seeking recovery of state income taxes unconstitutionally imposed. Conceding the illegality of the tax, the state nonetheless construed its refund statute not to allow the claim in state trial court and dismissed the action. *Id.* at 109. In a unanimous opinion, the Supreme Court held that the lack of any refund provision denied due process, because the taxes were imposed and paid, in part, on the understanding that illegal taxes would be refunded; that, in the Court's words, taxpayers "pay first, litigate later." *Id.* "'[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Id.* at 109-10 (citation omitted). *See generally* Seamon, *supra,* at 1110-15 (arguing that the Supreme Court's state taxation cases demonstrate that the procedural due process requirements of the Fourteenth Amendment require a state to provide a post-deprivation procedure that is clear and certain and that can result in an award of money from the state treasury).

{30} Analyzing *Reich*, the Court in *Alden* stated:

> [W]e held [in *Reich*] that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be "a clear and certain" postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. . . . In this context, due process requires the State to provide the remedy it has promised. The obligation arises from the Constitution itself; *Reich* does not speak to the power of Congress to subject States to suits in their own courts.

Alden, 527 U.S. at 740 (citations omitted),

{31} The parallel to the Mannings' case is striking. As in *Reich*, the State agencies have allegedly taken property but without providing a promised "postdeprivation remedy," in this case the remedy of "just compensation" promised in the Fifth Amendment which "arises from the Constitution itself." *See id.* As in *Reich*, 513 U.S. at 110, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding," the State agencies must provide that remedy or risk violating the due process clause. The only remedy for an erroneous tax collection is returning the tax. The only remedy for a taking of private property is just compensation, exactly as promised in the Constitution.

{32} The holding in *Alden* did nothing to alter this outcome, and in fact signaled its acceptance of that same result. We hold, therefore, that *Alden* did not alter the historical practice of applying the Takings Clause to the states, and nothing in that opinion permits a state to bar a claim for "just compensation" from its courts.

Other Jurisdictions

{33} Importantly, no other jurisdiction post-*Alden*, federal or state, has held that Takings Clause claims are barred by state constitutional sovereign immunity. In addressing a takings claim against the State of Kentucky in federal court, the Sixth Circuit noted that, notwithstanding constitutional sovereign immunity, the "Fifth Amendment's requirement of just compensation forces the states to provide a judicial remedy in their *own* courts." *DLX, Inc. v. Kentucky,* 381 F.3d 511, 527 (6th Cir. 2004). The Sixth Circuit specifically noted that *Alden* did not bar just compensation claims as asserted against the States. *Id.* at 528 (arguing that *Alden* only dealt with remedies created by Congress under Article I and that the just compensation remedy was different because it is required by the Constitution itself). The court found that the Eleventh Amendment barred the claim in federal court, but if brought in state court, the court would have been required to hear it. *Id. But see Azul-Pacifico, Inc. v. City of Los Angeles,* 973 F.2d 704, 705 (9th Cir. 1992) (takings claim against the city based directly on the Constitution was barred because 42 U.S.C. § 1983 could be utilized instead), *cert. denied,* 506 U.S. 1081 (1993).

{34} The South Dakota Supreme Court and the Oregon Court of Appeals also examined the same question that we address here. *See Benson v. State,* 710 N.W.2d 131 (S.D. 2006); *Boise Cascade,* 991 P.2d 563; *SDDS, Inc, v. State,* 650 N.W.2d 1, 9 (S.D. 2002). Both held that sovereign immunity does not bar just compensation claims brought against the state in state court, even after the *Alden* decision. *See also First Union Nat. Bank v. Hi Ho Mall Shopping Ventures, Inc.*, 869 A.2d 1193, 1197-98 (Conn. 2005) (holding a foreclosure claim on a municipal tax lien

asserted against the state was barred by sovereign immunity, but sovereign immunity would not bar the bank from seeking "just compensation for the state's taking of its property as a result of the allegedly unpaid taxes" under the Takings Clause as applied to the states under the Fourteenth Amendment).

{35} In *Boise Cascade,* 991 P.2d at 565, a state agency prohibited logging on a portion of a landowner's property because an endangered species was nesting in the location. The landowner claimed that not being allowed to log the site, which was purchased specifically for that purpose, constituted a taking under both the United States and Oregon Constitutions. *Id.* The Oregon court held that the United States Supreme Court, based on its statements in *First English* and its discussion of *Reich* in *Alden*, "did not intend to abandon the notion that at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved." *Boise Cascade,* 991 P.2d at 568.

{36} Three years later, relying in large part on the reasoning in *Boise Cascade,* the South Dakota Supreme Court similarly held that sovereign immunity did not bar a just compensation claim against the state in state court based on a regulatory taking similar to the Mannings' claim here. *See SDDS*, 650 N.W.2d at 9 ("[T]he holdings in the *Alden* trilogy apply only to congressional attempts to abrogate a state's sovereign immunity through Article I legislation. The *Alden* trilogy does not suggest that Fifth Amendment takings claims that originate from the Constitution itself are barred by the Eleventh Amendment.").

{37} *Boise Cascade, DLX,* and *SDDS* inform this case. Just as in *Boise Cascade,* the actions of the State agencies here impose environmental regulations which arguably have the effect of taking the Mannings' property, for which they may be entitled to compensation. All three of these opinions support the Mannings' claim that the Takings Clause creates a cause of action against a state which is actionable in state court and to which the state may not assert immunity. Most importantly, these cases support the conclusion that *Alden* did nothing to alter this outcome.

Self-Executing Nature of the Takings Clause

{38} The State agencies offer still another argument. They argue that the Fifth Amendment is not self-executing, and creates no claim for compensation without further congressional action.

{39} In examining specifically whether the Takings Clause is self-executing, we note that there are currently two views on the subject. One view agrees with the State agencies that the Takings Clause is not self-executing and that congressional action is required to enforce the rights protected in the Takings Clause. The other view is that congressional action is not necessary to enforce the attendant rights in state courts, because the Takings Clause is self-executing and creates both a right and remedy. *See Manning,* 2004-NMCA-052, ¶ 11 (citing Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law,* 52 VAND. L. REV. 57, 138 n.344 (1999)).

{40} The State agencies assert that the first view is correct and as support they cite to the Tucker Act. The

Tucker Act, 28 U.S.C. § 1491(a)(1), was passed in 1887 to give the federal court of claims jurisdiction over a wide variety of claims against the United States government, including claims for compensation.[6] *See Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 435, 437-38 (2003). Prior to its passage, owners who had property taken by the federal government had to petition Congress for compensation, or had to prove they had a contract claim against the United States. *Id.* at 438. Because the federal courts lacked jurisdiction over such claims before the Tucker Act, many were left with a right to compensation but no court in which to enforce that right. *Id.* at 437-38.

{41} The State asserts that the Tucker Act provides support for the assertion that the Fifth Amendment by itself never abrogated sovereign immunity. Under this theory, the State argues the Tucker Act both provides jurisdiction and waives sovereign immunity for Takings Clause claims against the federal government. Accordingly such a statutory waiver of immunity must be obtained

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[6] The Tucker Act states in pertinent part,

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491. Early precedent found that Takings Clause claims fell under the Tucker Act only if the claim could be classified as an "implied contract." Seamon, *supra*, at 1092 (quoted authority omitted). However, the Supreme Court later found that the clause itself creates a cause of action founded upon the Constitution, thus that section of the Tucker Act could be utilized rather than the implied contract section to obtain federal court jurisdiction. *Id.* at 1092-93.

before takings claims can be brought against the states. *See, e.g., Soriano v. United States*, 352 U.S. 270, 273 (1957) ("the Congress in the Act creating the Court of Claims gave the Government's consent to be sued therein only in certain classes of claims"); *Lion Raisons*, 57 Fed. Cl. at 437-38.

{42} The Mannings, on the other hand, assert that Congress never gave "permission" for the government to be sued under the Fifth Amendment, but rather the Tucker Act was only necessary to create federal jurisdiction over takings claims against the federal government. The Fifth Amendment itself created a remedy for unconstitutional takings that superseded governmental immunity. *See, e.g., Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("It is true that sovereign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is 'self-executing.'" (citing *United States v. Clark*, 445 U.S. 253, 257 (1980)); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 12 (1990) (takings claims are "founded on the Constitution" but the jurisdiction of the Court of Claims is based on the Tucker Act (quoting *United States v. Causby*, 328 U.S. 256, 267 (1946)); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (takings claims are "founded upon the Constitution"). The Tucker Act is a complex jurisdictional statute that provides the federal courts, courts of limited jurisdiction, with the ability to hear several specific types of claims against the federal government, including those founded upon the Constitution. *See supra* note 6; U.S. CONST. art. III, § 2 (outlining the jurisdiction of the federal courts).

{43} On its face, the Tucker Act only applies to federal takings claims filed against the federal government. No

court has applied the Tucker Act to the States. *See Benson,* 710 N.W.2d 131; *Boise Cascade,* 991 P.2d 563; *SDDS,* 650 N.W.2d 1; *First Union Nat. Bank,* 869 A.2d 1193. No court has applied the State's argument to state court proceedings, that because the Tucker Act was necessary to waive federal sovereign immunity for federal compensation claims, or so it is argued, then congressional action is necessary to abrogate state sovereign immunity for state compensation claims. We do not agree with the State's assertion that there must be a specific waiver of immunity before the state can be sued for "just compensation" under the Takings Clause. In our view, the Fifth Amendment is "self-executing." Requiring further governmental, action when it is the government that has effected the taking is contrary to the very reason for the Fifth Amendment: a check against abusive governmental power. If we were to accept the State's argument, New Mexico would be the first and only jurisdiction in the nation to apply this Tucker Act analysis to state court proceedings. We decline to do so.

{44} The State agencies do not rest with the previous argument. They further contend that the Takings Clause is not self-executing as applied to the states because it is applied through Section 1 of the Fourteenth Amendment, and only Section 5 of the Fourteenth Amendment can abrogate sovereign immunity. *See Seminole Tribe of Fla.,* 517 U.S. at 59 (holding Section 1 of the Fourteenth Amendment includes prohibitions on traditional state power). Section 1 says, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Section 5 says, "[t]he Congress shall have power to enforce, by

appropriate legislation, the provisions of this article." *Id.* The just compensation provision of the Takings Clause is made applicable to the states through the Fourteenth Amendment. *Chicago B. & Q. R. Co.*, 166 U.S. at 235-42. The Fourteenth Amendment's effect, at least in part, is to apply most of the first ten Amendments to the States. *See Adamson v. California*, 332 U.S. 46, 71-72 (1947), *overruled in part on other grounds by Malloy v. California*, 378 U.S. 1 (1964). Thus, the State agencies return to their point, discussed above, that Congressional action is necessary to enforce the Takings Clause against the states.

{45} We do not find the argument persuasive. It is Section 1 of the Fourteenth Amendment in conjunction with the "just compensation" remedy found in the Takings Clause that abrogates state sovereign immunity. Section 5 gives Congress the power to create remedies, if Congress decides any are necessary, to enforce the rights found in the Fourteenth Amendment, including those found in Section 1. An example of such legislation, protecting against the denial of due process is Title II of the Americans with Disabilities Act. 42 U.S.C. § 12101; *see also Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that Title II of the ADA was a valid use of Congress' power under Section 5 of the Fourteenth Amendment). The ADA provides the remedy under Section 5 to be applied when a state violates the Fourteenth Amendment by depriving an individual of due process and equal protection as found in Section 1. Congressional action is necessary under Section 5 because the Constitution does not contain a specific remedy for the rights it has created under Section 1: due process and equal protection. However, the Takings Clause

is different; it does have its own remedy within the text of the Fifth Amendment: just compensation.

{46} The Framers of the Constitution explicitly referred to remedies only twice in the Constitution, one being the just compensation provision of the Takings Clause. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 796-97 (5th ed. 2003) (stating that the second mention of a remedy is that of habeas corpus which is protected from interference by Congress). The Takings Clause creates an individual right to the remedy of just compensation. More specifically, as incorporated through the Fourteenth Amendment, the Takings Clause mandates that states have made, at the time of the taking, "reasonable, certain and adequate provision for obtaining compensation." *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 194 (citations and internal quotation marks omitted). *See generally* Seamon, *supra*, at 1108 (stating that a taking without a procedure for obtaining compensation violates the due process right found in Section 1 of the Fourteenth Amendment (citing *Reich*, 513 U.S. at 109)). This is the remedy intended by the Framers of the Constitution, and the remedy thereafter applied to the states through Section 1 of the Fourteenth Amendment.

{47} These factors lead us to conclude that the Takings Clause is self-executing, at least as applied to the states through the Fourteenth Amendment. We have found no judicial opinion specifically holding that it is not self-executing, and no case has held that to apply the Takings Clause to the states requires congressional action under Section 5 of the Fourteenth Amendment. The dearth of precedent used to support the State agencies' position

speaks in favor of a contrary view. *See, e.g., Alden,* 527 U.S. 706.

The Contracts Clause Claim

{48} The Mannings also seek compensatory damages for a violation of the Contracts Clause of the United States Constitution, asserting that their future and current contractual obligations are impaired by the Mining Act. The Contracts Clause says, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, §10. The State agencies again claim that state constitutional sovereign immunity bars the Mannings' claim.

{49} The Supreme Court in *Alden* discussed the Contracts Clause and sovereign immunity as related to its opinion in *Hans v. Louisiana*, 134 U.S. 1 (1890). In *Hans*, 134 U.S. at 10, the Supreme Court held that Louisiana was immune from suit in federal court based on a claim for money damages under the Contracts Clause. While we note that the holding in *Hans* is highly disputed, it has not yet been overturned. *See Seminole Tribe of Fla.*, 517 U.S. at 86 (Stevens, J., dissenting) (arguing that *Hans* "served only to establish a presumption against jurisdiction that Congress must overcome, not an inviolable jurisdictional restriction that inheres in the Constitution itself"); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 477-93 (1987) (rejecting the urging of Justices Brennan, Marshall, Blackmun and Stevens to overrule *Hans*). The Supreme Court in *Alden* revived the holding in *Hans*, referring to it as a case in which it had "sustained [a state's] immunity in a private suit arising under the *Constitution* itself." *Alden*, 527 U.S. at 732 (citing *Hans*, 134 U.S. 1).

{50} The Supreme Court's interpretation of *Hans* in *Alden* makes clear that the Mannings' Contracts Clause claim is barred by sovereign immunity because the Contracts Clause does not provide for claims for money damages. We have found no authority to the contrary.[7] In that respect, the Contracts Clause differs from the Takings Clause because only the latter contains its own remedy enforceable upon all those who take property without just compensation.

CONCLUSION

{51} For the foregoing reasons, we reverse the Court of Appeals regarding the Takings Clause claim and affirm regarding the Contracts Clause claim. We remand this case to the Court of Appeals to address ripeness issues.

{52} **IT IS SO ORDERED.**

/s/ Richard C. Bosson
RICHARD C. BOSSON,
Chief Justice

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[7] The cases cited in the Mannings' brief allow Contracts Clause actions to be asserted against the respective states, but neither claim is for individual money damages for impairment of private contracts. *Renaud v. Wyoming Department of Family Services*, 203 F.3d 723, 725-28 (10th Cir. 2000), did not involve an independent claim for money damages based on the Contracts Clause alone, but rather a breach of contract action. *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 408 (1983), was a request for declaratory judgment based on the Contracts Clause, not a request for money damages. Sovereign immunity did not bar these claims because neither sought money damages from the state directly under the Constitution, as was the situation in *Hans*.

WE CONCUR:

/s/ Patricio M. Serna
PATRICIO M. SERNA, Justice

/s/ Edward L. Chavez
EDWARD L. CHAVEZ, Justice

PAMELA B. MINZNER, Justice (dissenting)
PETRA JIMENEZ MAES, Justice (dissenting)

MINZNER, JUSTICE (dissenting).

{53} I respectfully dissent. The majority, in taking up this constitutional question, has followed the Court of Appeals away from a clear path for resolution of this dispute and into what appears to be a thicket of constitutional jurisprudence. I prefer to stay on a safer path and leave the task of cutting through the mass of federalism, takings, and sovereign immunity holdings for another day, and another court. I would simply hold, as the district court did, that this case is not yet ripe,

{54} "Ripeness doctrine is rooted in the same general policies of justiciability as standing and mootness." 13A CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532.1, 130 (2d ed. 1984). Lack of ripeness, like lack of standing, is a potential jurisdictional defect, which "'may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court.'" *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734, 31 P.3d 1008 (quoting *Alvarez v. State Taxation & Revenue Dep't*, 1999-NMCA-006, ¶ 6, 126 N.M. 490, 971 P.2d 1280). As a jurisdictional matter, ripeness must be addressed prior to any consideration of the merits of the case.

> As compared to standing, ripeness assumes that an asserted injury is sufficient to support standing, but asks whether the injury is too contingent or remote to support present adjudication. . . . Ripeness cases have generated a functional approach that directly weighs the importance of the interest advanced; the extent of the injury or risk; the difficulty of deciding the substantive issues and the allied need for specific factual illumination; and the sensitivity of the issues in relation to future cases, the states, and other branches of the federal government.

WRIGHT, MILLER, & COOPER, *supra,* at 130. "The values of avoiding unnecessary constitutional determinations and establishing proper relationships between the judiciary and other branches of the . . . government lie at the core of ripeness policies." *Id.* at 120; *see also Gunaji,* 2001-NMSC-028, ¶ 20 ("'constitutional rights should not be litigated unnecessarily'" (quoting *Lewis v. Iowa Dist. Ct.,* 555 N.W. 2d 216, 219 (Iowa 1996))). "'The basic purpose of ripeness law is and always has been to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.'" *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n,* 111 N.M. 622, 629-30, 808 P.2d 592, 599-600 (1991) (quoting 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25.1 (2d ed. 1983)); *see also City of Las Cruces v. El Paso Elec. Co.,* 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 ("We avoid rendering advisory opinions.").

{55} The district court held that the Mannings' mining operations were subject to a federal injunction stemming from separate federal litigation, *see Manning v. United States,* 146 F.3d 808 (10th Cir. 1998), and that mining operations could not resume until federal requirements

were met. The Mannings argued on appeal that the federal injunction could not be used to defeat ripeness because one element of compliance with the federal law was compliance with applicable state regulations. In this situation, they argued, their claim might never be considered because the state regulations would not be subject to review. The federal injunction indicates that the Mannings must file an operating plan with the Forest Service, including a plan for reclamation of operations and a bond to cover clean-up costs of mining and milling on public lands. No such plan or bond was filed with the Forest Service. Thus, New Mexico laws and regulations were not the only obstacles to the Mannings' mining operations; even in the absence of any New Mexico regulation, mining operations would be limited by federal law. In addition, it appears that the Mannings have not received a final decision from the relevant state agencies, and in fact withdrew their permit applications prior to commencement of this suit. The Mannings' argument, that the permitting process was unreasonably delayed, is not borne out by the record. Even if it were, it would not be a sufficient basis for a takings claim. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334-335 (2002) (rejecting "the extreme categorical rule" that normal delays in obtaining permits could constitute a taking because such a rule would "undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power"); *see also id.* at 337 nn.31-32 (recognizing that permitting delays are similar to temporary moratoria and further noting that even a total moratorium on new development for a limited time period is not a taking). I conclude the case is not ripe for decision. Under these circumstances, any ruling by this Court would be both speculative and advisory.

{56} Although this Court has the power to grant standing in exceptional cases presenting a matter of great public importance, and may waive objections for mootness when an issue is capable of repetition yet may avoid review, *Gunaji,* 2001-NMSC-028, ¶ 10. I am not persuaded it is appropriate to waive the issue of ripeness in this appeal. As explained above, the ripeness doctrine serves important judicial interests; protecting the court from issuing advisory opinions by requiring a present controversy between the parties, ensuring that facts are sufficiently developed for decision, avoiding intrusion on the powers of other branches of government and reserving judicial resources for present, rather than hypothetical questions. This case presents a question which may arise in the future, but can be resolved or reviewed at that time and is unlikely to evade such review. In light of the Court's strong interest in avoiding unripe cases, I conclude that this case does not warrant any exception to our general rules, limiting our jurisdiction to ripe cases.

{57} A decision on ripeness grounds would have the effect of vacating the Court of Appeals decision and I believe it is not necessary to remand the case for further proceedings. *See* WRIGHT, MILLER, & COOPER, *supra,* at § 3532.2, 137 n.42 and accompanying text. I would therefore affirm the district court's dismissal on ripeness grounds.

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

I CONCUR:

/s/ Petra J. Maes
PETRA JIMENEZ MAES, Justice

90 P.3d 506

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number ___

Filing Date: ___

Docket No. 23,396

RICHARD C. MANNING and EDWINA MANNING, Individually and as community property owners and d/b/a CHALLENGE MINING COMPANY,

Plaintiffs-Appellants,

vs.

MINING AND MINERALS DIVISION OF THE ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT OF THE STATE OF NEW MEXICO and NEW MEXICO ENVIRONMENT DEPARTMENT,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF CATRON COUNTY
John W. Pope, District Judge

Pete V. Domenici, Jr.
Lorraine Hollingsworth
Dolan & Domenici, P.C.
Albuquerque, NM

for Appellants.

Jerry A. Walz
Robert A. Bitterlich
Walz and Associates
Cedar Crest, NM

for Appellees.

OPINION

(Filed Jan. 28, 2004)

ALARID, Judge.

{1} This case turns upon the State's sovereign immunity. We hold that Plaintiffs' federal constitutional claims asserted against two State agencies are barred by New Mexico's sovereign immunity.

BACKGROUND

{2} Plaintiffs-Appellants, Richard C. and Edwina Manning d/b/a Challenge Mining Company (Plaintiffs), filed a second amended complaint asserting federal constitutional claims for money damages against Defendants-Appellees, Mining and Minerals Division of the Energy, Minerals, and Natural Resources Department of the State of New Mexico (MMD), and New Mexico Environment Department (NMED) (collectively Defendants). Plaintiffs alleged that they are the owners of property and property rights acquired for the purposes of mining, milling, and smelting operations. Plaintiffs alleged that Defendants have enforced various state environmental laws so as to prevent Plaintiffs from carrying on Plaintiffs' contemplated commercial operations. Plaintiffs asserted that Defendants' actions (1) constituted a regulatory taking of Plaintiffs' property in violation of the Fifth Amendment of the United States Constitution; (2) deprived Plaintiffs of their right to due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and (3) substantially impaired Plaintiffs' contractual relationships in violation of the Contract Clause of Article I, Section 10 of the United States Constitution.

{3} Defendants moved for summary judgment on several grounds, including ripeness and sovereign immunity. The district court granted summary judgment in favor of Defendants based on ripeness. Plaintiffs appealed.

DISCUSSION

{4} After this appeal was briefed and assigned to a panel, this Court requested supplemental briefs addressing the effect on this appeal of the Supreme Court's decision in *Cockrell v. Board of Regents of New Mexico State University*, 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876.[1] In *Cockrell*, our Supreme Court derived from the United States Supreme Court's decision in *Alden v. Maine*, 527 U.S. 706 (1999) the principle that "[New Mexico], by virtue of its sovereign role in the Union, is constitutionally immune from private suits for damages under a federal statute." *Cockrell*, 2002-NMSC-009, ¶ 15. The Supreme Court held that the judicial abrogation of sovereign immunity accomplished by *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), was limited to "common law causes of action," and that "it is within the sole province of the Legislature to waive the State's constitutional sovereign immunity." *Cockrell*, 2002-NMSC-009, ¶¶ 12-13. We *sua sponte* raised sovereign immunity because we are persuaded that the State's sovereign immunity as discussed in *Cockrell* is not merely immunity from liability for damages, it is immunity from a *suit* seeking such damages, *see Handmaker v. Henney*, 1999-NMSC-043, ¶¶ 12-14, 128

[1] *Cockrell* was decided after the issues in this case had been argued and decided by the trial court. Defendants' memorandum in support of their motion for summary judgment relied upon the United States Supreme Court's decision in *Alden*.

N.M. 328, 992 P.2d 879 (contrasting State's immunity from suit on unwritten contract with State's immunity from liability under Tort Claims Act); and, that reaching the merits of a federal claim that is barred by the State's sovereign immunity deprives the State of its "entitlement not to . . . face the . . . burdens of litigation," *id.*, ¶ 13 (quoting *Carrillo v. Rostro*, 114 N.M. 607, 615, 845 P.2d 130, 138 (1992)) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (internal quotation marks omitted).

{5} Two sub-questions are not in dispute. First, Plaintiffs do not argue that MMD and NMED are not "the State" for purposes of sovereign immunity. Second, Plaintiffs do not argue that the Legislature has waived New Mexico's immunity. Accordingly, we limit our analysis to the question of whether federal law overrides New Mexico's sovereign immunity from Plaintiffs' suit seeking money damages for alleged violations of the United States Constitution.

{6} In *Alden*, the Supreme Court rejected the contention that "substantive federal law by its own force necessarily overrides the sovereign immunity of the States." *Alden*, 527 U.S. at 732. The Supreme Court did not limit its observation to federal statutes; indeed, it noted that it previously had sustained a state's immunity "in a private suit arising under the *Constitution itself.*" *Alden*, 527 U.S. at 732 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)) (emphasis added). We conclude that New Mexico's sovereign immunity is not limited to federal statutory causes of action and that it applies to claims for damages asserted directly under the United States Constitution. *E.g. Hans*, 134 U.S. at 10 (holding State of Louisiana immune from suit in federal court on a claim for money damages asserted under the Contracts Clause); *see generally* Laurence

H. Tribe, *American Constitutional Law* 176 (2d ed.1988); *cf. Lynch v. United States*, 292 U.S. 571, 582 (1934) (observing that the sovereign immunity of the United States "applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution") (internal citations omitted).

{7} Because federal substantive law does not abrogate New Mexico's sovereign immunity "by its own force," we must be persuaded (1) that Congress has the authority to override the sovereign immunity of the states and (2) that it has exercised this authority to subject non-consenting states such as New Mexico to private suits for money damages. *Alden*, 527 U.S. at 756. Beginning with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court has repeatedly held that Congress lacks authority under Article I to abrogate the sovereign immunity of a non-consenting state. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (collecting cases). In view of these holdings, Section 5 of the Fourteenth Amendment is the only provision in the Constitution of which we are aware pursuant to which Congress could have abrogated New Mexico's immunity from Plaintiffs' suit for money damages. *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721, ___, 123 S. Ct. 1972, 1976-77 (2003). Although Congress has the authority under Section 5 to override the state's sovereign immunity and to subject non-consenting states to private suits for money damages for violations of the Constitution, it has not exercised this authority. 42 U.S.C. § 1983, the most obvious example of a statute enacted by Congress pursuant to Section 5 of the Fourteenth Amendment, does not override the states' traditional sovereign immunity. *Quern v.*

Jordan, 440 U.S. 332, 341 (1979). Plaintiffs have not cited, and we are not aware of, any other Section 5 legislation that would authorize Plaintiffs to bring their constitutional damages claims against a non-consenting state.

{8} Plaintiffs point out that they have asserted a claim directly under the Contract Clause, which applies to the states by its own terms. Plaintiffs' attempt to assert a claim directly under the Contract Clause, which is found in § 10 of Article I of the Constitution, runs up against the United States Supreme Court's holdings that federal substantive law does not of its own force override the sovereign immunity of the states and that Congress lacks the authority under Article I to subject non-consenting states to private suits for money damages. Moreover, Plaintiffs' Contract Clause claim is barred by the venerable authority of *Hans*.

{9} Plaintiffs, citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), argue that their takings claim is "self-executing." As Plaintiffs correctly observe, the Supreme Court has referred to the constitutional requirement of just compensation under the Takings Clause of the Fifth Amendment as "self-executing." *First English*, 482 U.S. at 315 (internal quotation marks and citation omitted). Plaintiffs' argument based upon the self-executing character of just compensation presents us with two separate inquires. One inquiry is whether the Takings Clause provides a damages remedy. We will assume, without deciding, that the self-executing character of the requirement of just compensation under the Takings Clause obviates the need for a statutory damages remedy and allows Plaintiffs to plead a claim for damages directly under the Constitution without invoking § 1983 or other enabling legislation. A second

inquiry is whether, assuming the existence of a direct action for damages under the Takings Clause, that remedy may be asserted in a private action against a non-consenting state. *First English* did not involve a suit against a state or an arm of the state, and therefore the Supreme Court was not called upon to decide whether a non-consenting state would be immune from a suit seeking just compensation under the Takings Clause. *Harrison v. Hickel*, 6 F.3d 1347, 1352 (9th Cir. 1993); *see also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 138 n.344 (1999) (noting that defendant in *First English* was a county); *Alden*, 527 U.S. at 756 (observing that a state's sovereign immunity bars suits against the state itself, but not "lesser entities," and that "immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State").

{10} The Takings Clause of the Fifth Amendment does not directly apply to the states. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). It applies to the states through the Due Process Clause of the Fourteenth Amendment, *First English*, 482 U.S. at 310, n.4; *see also* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 523 (3d ed. 1999). Even if we assume that the self-enforcing character of the remedy afforded by the Takings Clause allows Plaintiffs to plead a damages claim directly under the Fifth and Fourteenth Amendments, Plaintiffs still must overcome New Mexico's sovereign immunity. Plaintiffs face "[t]he logical implication from *Quern* . . . that if § 1983 did not abrogate traditional [sovereign] immunity, Section 1 of the Fourteenth Amendment by

itself surely does not; otherwise there would have been no sovereign immunity left intact for Congress to have failed to abrogate when passing § 1983 in 1871." *Santiago v. N.Y. State Dep't of Corr. Servs.*, 945 F.2d 25, 31 (2d Cir. 1991).

{11} We recognize that the Supreme Court's reference in *First English* to the self-executing character of the Takings Clause suggests "two paths of development." Brauneis, *supra*, at 138 n.344. First, it could be read to support the argument that the Fifth Amendment as incorporated by the Fourteenth Amendment both creates a damages remedy and abrogates the sovereign immunity of the defendant. *Id.* Two state appellate courts have interpreted the Takings Clause in this way. *Boise Cascade Corp. v. State*, 991 P.2d 563 (Ore. Ct. App. 1999); *SDDS, Inc. v. State*, 650 N.W.2d 1 (S.D. 2002). However, neither of these courts appears to have recognized that, notwithstanding the self-enforcing character of the Takings Clause, the Supreme Court has never held that the Takings Clause overrides the sovereign immunity of the United States, against which it is directly applicable, or of the states, to which it applies through the Fourteenth Amendment. *See* Brauneis, *supra*, at 137-38. A second approach to the self-enforcing character of the Takings Clause is that it merely provides a damages remedy against those lesser entities such as counties or municipalities that do not share the state's sovereign immunity. *Id.* at 138 n.344. We believe that this second approach is more consistent with the absence of Supreme Court precedent holding that the Takings Clause overrides state or federal sovereign immunity from suits for money damages and with the Supreme Court's recent pronouncements in *Alden* regarding the structural significance of state

sovereign immunity in the federal system established by the Constitution.

{12} For the reasons given above, we conclude that federal law does not override New Mexico's sovereign immunity from suit on the federal constitutional claims asserted by Plaintiffs.

CONCLUSION

{13} We affirm the order of the district court dismissing Plaintiffs' complaint with prejudice.

{14} **IT IS SO ORDERED.**

/s/ A. Joseph Alarid
A. JOSEPH ALARID,
Judge

WE CONCUR:

/s/ Lynn Pickard
LYNN PICKARD, Judge

/s/ Cynthia A. Fry
CYNTHIA A. FRY, Judge

IN THE SEVENTH JUDICIAL DISTRICT
COUNTY OF CATRON
STATE OF NEW MEXICO

RICHARD C. MANNING AND EDWINA MANNING, Individually and as community property owners and d/b/a/ CHALLENGE MINING COMPANY,

Plaintiffs,

vs. **D-0728-CV 98-08**

MINING AND MINERALS DIVISION OF THE ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT OF THE STATE OF NEW MEXICO, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIFTH AMENDMENT, FOURTEENTH AMENDMENT AND ARTICLE I CLAIMS BASED ON RIPENESS

(Filed Jul. 11, 2002)

THE COURT, having considered the briefs submitted by the Parties and oral arguments made by Counsel at the hearing on February 26, 2002 on Defendants' Motions for Summary Judgment, and, having issued a letter opinion on March 8, 2002, the Court finds as follows:

I. The Defendants filed six Motions for Summary Judgment: Defendants' Motion for Summary Judgment on Plaintiffs Fifth Amendment, Fourteenth Amendment and

Article I Claims Based on Ripeness, Defendants' Motion for Summary Judgment Based on Sovereign Immunity, Defendants' Motion for Summary Judgment on Plaintiffs' Article I Claims, Defendants' Motion for Summary Judgment Based on Nuisance, Defendants' Motion for Summary Judgment Based on Failure to Pay Annual Permit Fees, and Defendants' Motion for Summary Judgment Based on Plaintiffs' Due Process Claims. Three of the Summary Judgment Motions addressing the Fifth Amendment Claims, the Due Process Claims and the Article I Impairment of Contract Claim requested dismissal on the grounds of ripeness and sovereign immunity.

2. The injunction imposed by Judge Black in the federal lawsuit entitled *Richard Manning v. United States of America*, CIV 95-19-BB/LCS precludes a finding that Plaintiffs' claims against the named Defendants are ripe for adjudication by this Court.

3. Judge Black's findings 10 through 13, 16, 27, 28, 30 and Conclusions of Law 5 through 11 conclusively demonstrate that the mining operation of the Mannings could not proceed until the federal requirements were met. The Court makes no decision as to whether the state Defendants acted arbitrarily or capriciously. Judge Black's findings establish that the difficulties faced by Plaintiffs in their mining operation pre-date the state statute on mining.

4. All other Motions for Summary Judgment are denied at this time, including Defendants' Motion for Summary Judgment Based on Sovereign Immunity, Defendants' Motion for Summary Judgment on Plaintiffs' Article I Claims, Defendants' Motion for Summary Judgment Based on Nuisance, Defendants' Motion for Summary Judgment

Based on Failure to Pay Annual Permit Fees, and Defendants' Motion for Summary Judgment Based on Plaintiffs' Due Process Claims.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment on Plaintiff's Fifth Amendment, Fourteenth Amendment and Article I Claims Based on Ripeness is hereby GRANTED and Plaintiffs' Second Amended Complaint is hereby DISMISSED with prejudice.

JOHN W. POPE, DIV. I
Honorable John W. Pope
District Court Judge

Approvals:

Submitted by:

/s/ Jerry A. Watz
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Approved by:

Approved by signed
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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

May 12, 2004

NO. 28,500

RICHARD C. MANNING and EDWINA MANNING, individually and as community property owners and d/b/a CHALLENGE MINING COMPANY,

Plaintiffs-Petitioners,

vs.

MINING AND MINERALS DIVISION OF THE ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT OF THE STATE OF NEW MEXICO and NEW MEXICO ENVIRONMENT DEPARTMENT,

Defendants-Respondents.

WRIT OF CERTIORARI

TO: New Mexico Court of Appeals

GREETINGS:

WHEREAS, petitioners did apply to this Court on February 13, 2004, for review of an opinion issued by the New Mexico Court of Appeals on January 28, 2004, in cause numbered 23,396 captioned *Manning v. New Mexico Energy Minerals and Natural Resources Department*;

WHEREAS, the Supreme Court gave notice to the Court of Appeals on February 13, 2004, in compliance with Rule 12-502 NMRA of the Rules of Appellate Procedure, that a petition for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the petition for writ of certiorari has been served on respondents in the above entitled cause.

NOW, THEREFORE, the writ of certiorari hereby is issued and the New Mexico Court of Appeals hereby is ordered to proceed no further in cause numbered 23,396 pending further order of this Court.

IT IS SO ORDERED.

WITNESS, Honorable Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 11th day of May, 2004.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE NO. 28,500

TO the NEW MEXICO COURT OF APPEALS, GREETINGS:

WHEREAS, in cause numbered 23,396 on your civil docket wherein Edwina Manning, et al., were plaintiffs, Mining and Minerals Division, et al, were defendants, summary judgment on the basis or ripeness was entered in favor of defendants;

WHEREAS, the cause and judgment was afterwards brought by plaintiffs into the New Mexico Court of Appeals upon appeal whereupon an opinion was issued on January 28, 2004, affirming the judgment of the district court; and

WHEREAS, the cause and judgment was afterwards brought by plaintiffs into this Court by petition for writ of certiorari, which was granted on May 11, 2004, whereupon an opinion was issued on June 1, 2006, reversing in part and affirming in part the judgment of the New Mexico Court of Appeals.

NOW, THEREFORE, this cause is remanded to address ripeness issues and for other proceedings consistent and in conformity with the opinion of this Court.

WITNESS, Honorable Richard C. Bosson, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 16th day of June, 2006.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD C. MANNING AND EDWINA MANNING, Individually and as community property and d/b/a CHALLENGE MINING COMPANY,

Plaintiff,

v.

MINING AND MINERALS DIVISION OF THE ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT OF THE STATE OF NEW MEXICO, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Defendants.

No. CIV 99-507 JHG/LFG

ORDER OF REMAND

This matter is before the Court on Plaintiffs' Motion for Remand, filed August 18, 1999. Plaintiff moves the Court to remand the case to the Seventh Judicial District Court for the County of Catron, State of New Mexico. As grounds for this motion, Plaintiffs claim this Court lacks subject matter jurisdiction to entertain this matter because of the State Defendants' Eleventh Amendment Immunity. Having reviewed the motion, the memoranda in support and in opposition, and the applicable law, the

Court finds that the motion is well taken and will be granted.

Plaintiffs originally filed this action in the Seventh Judicial District Court against the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department of the State of New Mexico (MMD) and the New Mexico Environmental Department (NMED). Defendants removed the case to this Court on May 4, 1999, pursuant to 28 U.S.C. § 1446. Plaintiffs' First Amended Complaint, which is before this Court, alleges violations of the Fifth Amendment, the Fourteenth Amendment, and violations of Plaintiffs' civil rights pursuant to 42 U.S.C. § 1983.

Plaintiffs allege the Eleventh Amendment bars this Court from hearing this action because they are seeking damages against the State of New Mexico. Moreover, Plaintiffs claim the State Defendants have not waived the State's Eleventh Amendment immunity. On the other hand, Defendants claim remand is improper because they no longer have any Eleventh Amendment immunity. Defendants claim that under *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999), immunity was effectively waived at the moment of removal.

"[T]he Eleventh Amendment bars suits in federal court for damages against states, state agencies, and state officials in their official capacities, unless the state unequivocally waives its immunity or Congress expressly abrogates the state's immunity in creating a statutory cause of action." *Archuleta v. Lacuesta*, 131 F.3d 1359, 1361 (10th Cir. 1997). In *Sutton*, the Court of Appeals for the Tenth Circuit found that the Eleventh Amendment

immunity could not be waived and should be given full effect absent some extraordinarily effective waiver. *Sutton*, 173 F.3d at 1235. The Court of Appeals found that *Sutton* presented circumstances of an "extraordinarily effective waiver." *Id.* The court came to this conclusion based on the following: (1) the invocation of federal court jurisdiction was brought about by defendants' own counsel; (2) the Eleventh Amendment bar to suit against Utah was effectively waived by the Office of the Attorney General of Utah by removal of the case to federal court; and (3) the Attorney General's Office for the State litigated the merits of the case following the removal. Specifically, the Court of Appeals found that the Attorney General had the authority to take those actions and found it "grossly inequitable to allow [the State of Utah] assertion of the Eleventh Amendment bar by the contention made at oral argument before us." *Id.* at 1236.

In this case, the Court finds that MMD and NMED may not have the authority to take actions that would constitute an "extraordinarily effective waiver" of the State's Eleventh Amendment immunity. The Court lacks subject matter jurisdiction to entertain this action and thus Plaintiff's Motion to Remand is granted.

NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiff's Motion to Remand is granted and this action is remanded to the Seventh Judicial District Court for the County of Catron, State of New Mexico.

IT IS FURTHER ORDERED that Plaintiff's request for the payment of costs and actual expenses, including attorney fees, incurred as a result of the removal of this action from New Mexico state court is denied.

/s/ Joe H. Galvin
JOE H. GALVAN
UNITED STATES
MAGISTRATE JUDGE

146 F.3d 808

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RICHARD MANNING,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 96-2258

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-95-19-BB)

(Filed June 17, 1998)

Peter V. Domenici, Jr., Dolan & Domenici, P.C., Albuquerque, New Mexico, for Plaintiff-Appellant.

John W. Zavitz, Assistant United States Attorney (John J. Kelly, United States Attorney), United States Attorney's Office, Albuquerque, New Mexico, for Defendant-Appellee.

Before **ANDERSON**, **LOGAN**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

Richard Manning appeals from the district court's grant of declaratory and injunctive relief to the United States. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court affirms.

I. BACKGROUND

Manning owns an ore-processing plant located on an unpatented millsite within the boundaries of the Gila National Forest. Manning has operated this facility since 1978. On October 5, 1993, two employees of the United States Forest Service inspected Manning's millsite after entering the site through the locked fence surrounding the ore-processing facility.

Manning filed this action in January 1995 as a civil rights complaint, seeking declaratory and monetary relief against the two Forest Service employees as well as one New Mexico state employee based on their allegedly unauthorized inspection of the millsite. Manning subsequently voluntarily dismissed the claim for monetary relief against the individual federal employees and dismissed all his claims against the state employee, leaving only claims for declaratory and injunctive relief against the federal employees in their official capacities. In his complaint, Manning requested the court to "declare that Defendants must honor and observe the Fourth Amendment to the United States Constitution in gaining access to and searching Plaintiff's mill site and buildings, and must do so by first obtaining a warrant based upon probable cause or

by complying with the guidelines for administrative and regulatory searches . . . ."

The United States answered as the real party in interest and was substituted as the named Defendant. The United States also asserted a counterclaim for declaratory and injunctive relief against Manning, requesting that Manning be required to provide the Forest Service with a key to the millsite and requesting that Manning be enjoined from any further operations at the site until the Forest Service had approved a new plan of operations, or a plan for reclamation if operations had ceased, and until Manning had provided the necessary bond. In the counterclaim, the United States asserted that although the Forest Service originally approved Manning's operating plan in 1978, Manning had substantially modified operations at the millsite since that time. The United States claimed that the "modified operations ha[d] not been approved by the Forest Service and are not in compliance with the previous approved plan of operations."

In response, Manning claimed he had modified and updated the original operating plan "without objection from the Forest Service." Manning further requested that the court "declare that his operating plan was updated, modified and supplemented in 1985 and remains valid and in full force and effect through the year 2000."

The district court granted Defendant's motion for partial summary judgment insofar as it required Manning to provide the Forest Service with a key allowing access to the area surrounding the mill, although the court stated that Manning could separately lock the mill buildings and was not required to provide the Forest Service with unrestricted access to the mill. Following the trial, the

court awarded declaratory judgment in favor of Defendant, holding that no valid plan of operations was in effect and that no Fourth Amendment violation occurred.

On appeal, Manning asserts (1) the district court erred in striking Manning's jury demand for his claims under the Declaratory Judgment Act; (2) the district court erred in refusing to grant Manning's motion to amend his counterclaim to add damage claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680; (3) a number of the district court's factual findings are clearly erroneous; (4) a number of the district court's legal conclusions are contrary to law; (5) the district court erred in determining that the Multiple Use Mining Act of 1955, 30 U.S.C. § 601, *et seq.*, applies to unpatented millsite claims.

II. ANALYSIS

A. Denial of Jury Trial

Manning first asserts the district court erred in denying his demand for a jury trial for his claims under the Declaratory Judgment Act. This court reviews de novo the trial court's determination that Manning was not entitled to a jury trial. *See Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir. 1995).

Manning notes that the Declaratory Judgment Act "preserves the right to jury trial for both parties" and asserts the district court therefore erred in refusing to grant a jury trial for the factual issues raised by his claims under this Act. In so arguing, Manning is apparently suggesting that the Declaratory Judgment Act provides a

right to a jury trial whenever a party is seeking declaratory relief and there are factual issues to be determined.[1]

Manning is correct in asserting that the Declaratory Judgment Act preserves the right to a jury trial. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959); *see also Northgate Homes, Inc. v. City of Dayton*, 126 F.3d 1095, 1098-99 (8th Cir. 1997) ("A litigant is not necessarily deprived of a jury trial merely because it is a party to a declaratory judgment action."); *Hargrove v. American Cent. Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942) (stating that use of "[t]he procedural remedy afforded by the Declaratory Judgment Act . . . does not alter or invade the right of trial by jury as at common law"). Nevertheless, "[s]eeking declaratory relief does not entitle one to a jury trial where the right to a jury trial does not otherwise exist." *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 662 (6th Cir.), *cert. denied*, 117 S. Ct. 49 (1996).

Whether Manning is entitled to a jury trial under the Seventh Amendment depends on whether his action is equitable or legal in nature. *See Bowdry*, 58 F.3d at 1489. Actions at law entitle the parties to a jury, but equitable cases do not. *See id.* "Declaratory relief may be legal or equitable depending on the basic nature of the underlying issues." *United States v. New Mexico*, 642 F.2d 397, 400 (10th Cir. 1981); *see also Northgate Homes, Inc.*, 126 F.3d at 1099. In this case, Manning's action was equitable in nature. Manning was not requesting monetary damages, but was seeking only equitable relief in the form of a declaratory judgment and injunction. The fact that he

[1] Manning has not identified any other statute which provided him with a right to a jury trial in this case.

requested a declaratory judgment, in connection with the injunctive relief, did not alter the basic equitable nature of his action. *See Robinson v. Brown*, 320 F.2d 503, 505 (6th Cir. 1963) ("The inclusion of a claim for declaration of rights in the complaint did not . . . convert an equity case into an action at law"); *see also Northgate Homes, Inc.*, 126 F.3d at 1099. The district court therefore did not err in striking Manning's jury demand as to his claims under the Declaratory Judgment Act.

B. Federal Tort Claims Act

Manning next asserts the district court erred in denying his motion to amend his reply counterclaim to add damage claims under the FTCA. This court reviews the district court's decision to deny Manning's motion to amend for abuse of discretion. *See Federal Kemper Life Assurance Co. v. Ellis*, 28 F.3d 1033, 1041 (10th Cir. 1994).

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend the pleadings after the time for amending as a matter of course "only by leave of court or by written consent of the adverse party," but that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has stated that "[i]n the absence of any apparent or declared reason – such as . . . repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178 (1962).

The district court articulated a number of reasons for denying Manning's motion to amend. The district court

noted that the case had been pending for over a year, that "the pleadings ha[d] been amended repeatedly, including two previous 'reply counterclaims' by Plaintiff," and that the motion to amend was made shortly before the close of discovery and less than four months prior to the scheduled trial.

The district court also stated that there were jurisdictional flaws with the proposed reply counterclaim. In asserting the FTCA claim, Manning did not specify the tort or the basis of his tort claim other than incorporating federal constitutional violations previously alleged. In the district court, Manning argued that those constitutional torts could be asserted under the FTCA.[2] As the district court noted, however, constitutional torts are not actionable under the FTCA. *See FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994).

The district court did not abuse its discretion in denying the motion to amend on the above grounds.

C. District Court's Factual Findings

Manning next challenges eight of the district court's factual findings, claiming they are incomplete, misinterpret testimony, contain improper implications, and rely on noncredible testimony while disregarding contrary credible testimony.

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[2] On appeal, Manning appears to argue that his FTCA claim for damages was premised on a negligence cause of action under state law. Because this was not presented to the district court, however, this court does not consider this alternate theory.

This court must accept the district court's factual findings unless they are clearly erroneous. *See Exxon Corp. v. Gann*, 21 F.3d 1002, 1005 (10th Cir. 1994). "A finding of fact is 'clearly erroneous' if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made." *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir. 1985) (citation omitted). "On appeal, we view the evidence in the light most favorable to the district court's ruling and must uphold any district court finding that is permissible in light of the evidence." *Exxon Corp.*, 21 F.3d at 1005 (citation omitted). This court further gives due regard to the district court's opportunity to judge the credibility of witnesses. *See* Fed. R. Civ. P. 52(a).

After reviewing the record, this court concludes the district court's factual findings are supported by evidence in the record and are not clearly erroneous. Although different inferences may be drawn from the evidence presented before the district court, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). Further, Manning's arguments regarding the credibility of witnesses would require this court to disregard the district court's credibility determinations, which this court may not do. *See id.* at 573-75.

D. District Court's Legal Conclusions

Manning also challenges six of the district court's legal conclusions concerning the interpretation and application of Forest Service regulations promulgated under

the Multiple Use Mining Act. In challenging the district court's legal conclusions, Manning asserts generally that the district court "selectively cites from portions of the regulations, but does not capture the intent and understanding of the regulations which provide the predictable, mandatory process for obtaining operating plans, including satisfying reclamation and bond requirements." Manning further asserts that the district court's "erroneous conclusions of law . . . amount to lack of due process."

This court reviews the district court's conclusions of law de novo. *See Averhart v. US WEST Management Pension Plan*, 46 F.3d 1480, 1485 (10th Cir. 1994). Upon review, this court finds no reversible error in the district court's interpretation and application of the law to the particular facts of this case, and this court therefore rejects Manning's challenge to the district court's conclusions of law.

E. Multiple Use Mining Act of 1955

Manning finally asserts the district court erred in determining that the Multiple Use Mining Act of 1955, 30 U.S.C. § 601, *et seq.*, applies to unpatented millsite claims and that based on this Act the United States has the right of free access to the surface of such claims for inspection and regulation purposes. Manning asserts the Act does not cover millsite claims, and argues the district court's determination that the Act applies to millsite claims is inconsistent with the Act's language and legislative history, with the treatment of millsites in other federal statutes, and with mining practice and custom. Manning further asserts that because the 1955 Act does not provide the United States with a right of access to millsite claims,

the entry by the Forest Service employees onto his millsite violated the Fourth Amendment.

The Mining Act of 1872 conferred a statutory right to enter upon federal public lands to search for minerals and provided that the locators of mining claims had "exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26; *see* 36 C.F.R. § 228.1 (1997). "This statute was construed to mean that as against parties other than the United States, the locator had exclusive right to use the surface of this land." *Silbrico Corp. v. Ortiz*, 878 F.2d 333, 335 (10th Cir. 1989) (internal quotation omitted).

In 1955, Congress amended the mining laws by passing the Multiple Use Mining Act, 30 U.S.C. § 601, *et seq.*, which retained to the Federal Government the right to manage the surface resources of subsequently located unpatented mining claims. *See* 30 U.S.C. § 612(b). The Act provides that the unpatented mining claims are subject to the right of the United States and its permittees and licensees to manage surface resources and "to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land" so long as such does not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." *Id.*

Manning asserts the Act's language "is clear on its face, applying only to mining claims and not to millsite claims." Contrary to this assertion, however, the Act does not address the issue but is silent with respect to whether millsites are covered. The Act refers generally to "any mining claim hereafter located under the mining laws of

the United States," without defining "mining claim" to either include or exclude millsites. *Id.*

The Department of the Interior, the agency primarily charged with administering the Act,[3] has promulgated regulations for the surface management of mining claims "to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws." 43 C.F.R. § 3809.0-1 (1997). These regulations define "mining claim" as including "any unpatented mining claim, *millsite*, or tunnel site located under the mining laws . . . ." *Id.* § 3809.0-5(d) (emphasis added).[4]

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[3] The Department of the Interior "has been granted plenary authority over the administration of public lands, including mineral lands." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *see also* 43 C.F.R. § 3809.0-3 (1997); 36 C.F.R. § 228.1 (1997).

[4] Shortly after the enactment of the Multiple Use Mining Act of 1955, the Solicitor of the Department of the Interior opined that millsites were covered by the Act. *See Effect of Section 4 of the Act of July 23, 1955 on Mill Site Locations*, 64 Interior Dec. 301, 1957 WL 8735 (July 22, 1957) (stating that although the Act "is silent as to mill sites as such, I think that there is no doubt that it applies to mill site locations" and noting that "the Department has held with respect to the act of June 4, 1897 . . . , which is silent as to mill-site locations and which permits mining locations in national forests, that it applies to mill-site locations as the mill-site provision of . . . 30 U.S.C. sec. 42 . . . is an essential part of the present system of mining laws" (internal citation omitted)). Although the Solicitor's opinion is not entitled to the substantial deference afforded under *Chevron*, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this court may look to the opinion for guidance and is permitted to give the opinion some weight. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Some reliance on the opinion is particularly warranted here given that the opinion is consistent with earlier and later pronouncements by the agency. *See id.* at 140.

The Forest Service, responsible for managing the National Forests,[5] has also promulgated regulations which "apply to operations ... conducted under the United States mining laws ... as they affect surface resources on all National Forest Service lands." 36 C.F.R. § 228.2 (1997). The Forest Service regulations, like the Interior Department regulations, define "mining claim" as including "[a]ny unpatented mining claim or *unpatented millsite* authorized by the United States mining laws of May 10, 1872, as amended." *Id.* § 228.3(d).

Because Congress did not clearly address the issue, this court defers to interpretations of the statute by the agencies charged with its administration, provided such interpretations are based on a permissible construction of the statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). One of the primary purposes of the Multiple Use Mining Act of 1955 was to "amend the general mining laws to permit more efficient management and administration of the surface resources of the public lands by providing for multiple use of the same tracts of such lands." H.R.Rep. No. 84-730 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2474. The Act was intended to continue to encourage exploration and development of mineral resources on public lands

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[5] Congress has delegated to the Secretary of Agriculture the authority to make "rules and regulations" to "regulate [the] occupancy and use" of national forests. 16 U.S.C. § 551; *see also* 30 U.S.C. § 601; *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 582 (1987). Through this delegation of authority, the Department of Agriculture's Forest Service has promulgated regulations so that "use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws ... shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1 (1997).

under the general mining laws while also giving "full recognition to the vital importance of the forest and range resources of the public lands and the national forests." *Id.* Therefore, the legislation sought to foster mining activity "compatible with utilization, management, and conservation of surface resources" such as timber, water, wildlife, parks, monuments, and recreation areas. *Id.* The Interior Department and Forest Service regulations defining "mining claim" as including "millsites" are reasonable and consistent with the purpose of the statute to allow the efficient use, management, and conservation of the surface resources of public lands. This court thus concludes the Act applies to millsites.

Because the Forest Service has the authority to regulate Manning's millsite operations, this court rejects Plaintiff's contention that the Forest Service had no right of access to his site and that the Forest Service employees' entry onto the millsite violated his Fourth Amendment rights.

III. CONCLUSION

The district court did not err in striking Manning's jury demand, nor did the court abuse its discretion in refusing to grant Manning's motion to amend his counterclaim to add damage claims under the FTCA. The district court's factual findings are not clearly erroneous, nor are the court's legal conclusions contrary to law. Finally, the district court did not err in determining the Multiple Use Mining Act of 1955 applies to unpatented millsite claims. The judgment of the district court is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD MANNING, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 96-2258

JUDGMENT

Filed June 17, 1998

Before **ANDERSON**, **LOGAN** and **MURPHY**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: /s/ [Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD C. MANNING,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendants.

CIV-95-0019 BB/LCS

STIPULATED ORDER OF FINAL JUDGMENT

(Filed Dec. 26, 1996)

THIS MATTER having come before the Court on the parties' Stipulated Motion to Correct Final Judgment, and the Court having reviewed the pleadings and being fully advised in the premises:

IT IS THEREFORE ORDERED, that the "Final Judgment" entered on August 29, 1996, together with the Court's prior rulings and memorandum opinions, constitute the Final Judgment and completely adjudicate all the claims of the parties.

/s/ Bruce D. Black
HONORABLE BRUCE D. BLACK
Judge of the United States
District Court

Respectfully submitted,

DOLAN & DOMENICI, P.C.

/s/ P. Domenici
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD MANNING,

Plaintiff,

v. No. CIV 95-19 BB/LCS

UNITED STATES OF AMERICA,

Defendant.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Aug. 29, 1996)

THIS MATTER came on for a trial to the Court without a jury on July 29, 30, and 31, 1996, and all evidence having been presented, and the parties having submitted their respective proposed findings of fact and conclusions of law, the Court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. The original Challenge Mill, consisting of facilities, was located on approximately 160 acres of unpatented mining claims. In 1989, some of these mining claims were convened to mill site claims consisting of fifteen 5-acre parcels identified as "MOG Claims #1-15."

2. Since 1989, the Bureau of Land Management, the agency responsible for recognizing and administering claims under the Federal Land Policy and Management Act of 1976, has recognized Plaintiff's claims on which the mill sits as mill site claims.

3. The current Challenge Mill site is located on approximately 13 acres of National Forest System lands within the Gila National Forest near Mogollon, New Mexico. The Challenge Mill site is enclosed by a chain link fence and consists of a number of buildings, machinery, dirt tanks, and other improvements.

4. Operations at the mill site were originally approved by the Forest Service under a letter of approval dated July 8, 1978.

5. The description of proposed operations from Plaintiff, on which the original approval was based, called for all equipment to be containerized and of a temporary nature without foundations or other permanent surface disturbance.

6. The operating plan as originally approved by the Forest Service in 1978 required the posting of a $7,000 bond, including $4,000 for site reclamation. In the letter of approval, the District Ranger set out the following stipulations in paragraph 1 for the performance bond; "The remaining four thousand dollars ($4,000) will be held to cover maintenance of resource protection facilities and final site restoration, in addition to resource protective measures as discussed in items 2, 9, 11, and 12. This remaining sum will be considered an adjustable amount based on performance of the operator." The same day the Forest Service also sent an explanatory letter to Plaintiff which stated: "The remaining four thousand dollars ($4,000) will be considered an adjustable amount according to the satisfactory compliance of the below listed items: 1. Removal of all mining improvements from Forest Service lands. . . ."

7. Between 1983 and 1985, Plaintiff substantially changed both the method of processing and the nature of extent of improvements on the mill site.

Rather than the heap leach cyanide method approved in the 1978 plan of operations, the Challenge Mill was converted to a flotation process. Under this process, ore is crushed before it is concentrated. There are connecting pipelines from the crusher to the hydrometallurgical smelter to the electroplater. The electroplated gold and silver are taken outside and acid is added in drums to remove the steel wool. This process must take place outdoors because the acid gas is poisonous. The material is then brought inside and filtered, taken by cart to drying ovens, taken to a final smelter building, fluxed, furnaced, and turned into bullion.

8. All of the major facilities within the 12-acre mill compound constitute "the mill." These facilities include the crusher units, the flotation units, all units used to concentrate the ore, the electro-lining units, the smelter units.

9. During the conversion of the facility to a flotation mill, Plaintiff was informed by District Ranger Otteni that his original operating plan was far exceeded and that he needed to work with the Forest Service to develop a modified operating plan.

10. As early as 1983, the Forest Service recognized in writing the changes to the operation and requested information be provided which included documentation and descriptive layout and other information updating the present operation; including development of a "revised plan of operations."

11. After John Garland became District Ranger of the Glenwood District, he reviewed the district files and found there was no plan of operations for the Challenge Mill. Mr. Garland decided to issue Plaintiff a notice of non-compliance.

12. On January 24, 1985, Mr. Garland issued a letter of non-compliance to Plaintiff. The letter discussed in detail the various changes made to the facility between 1978 and 1985 and requested specific information. The letter further noted "the overview description to amend your operation, which you have already provided us, was a good start."

13. The notice of non-compliance noted a number of items that the Forest Service needed to adequately assess the mill site including information on the facilities, flow sheets, reclamation plan, waste disposal plans, and future planned improvements.

14. In early 1985, District Ranger Garland toured the mill site with Plaintiff.

15. On February 5, 1985, Mr. Garland issued a letter that resulted from the meeting and inspection of the operation. The letter rescinded the letter of non-compliance of January 24, 1985, and stated "we still need the information we discussed to complete your operating plan."

16. John Baumberger, a Forest Service staff person, was assigned to insure a new plan of operations was put in place for the Challenge Mill and requested additional information on several occasions from Plaintiff and the geologist for Challenge, Inc., Pete Springer. However, Mr. Baumberger could, never get the detailed information necessary to calculate appropriate financial and environmental parameters for reclamation of Plaintiff's operation at the mill site.

17. While Plaintiff and his employees did provide some of the additional data and information which the Forest Service requested, both Mr. Baumberger and Mr. Garland testified that such information did not adequately cover reclamation.

18. In 1986, Plaintiff considered building a new mill facility. During the course of these considerations, he presented a proposed "Plan of Operations" to the United States Forest Service. In 1986 and 1987, Plaintiff abandoned plans to either expand the existing facility or build a new facility.

19. Since 1987, the mill has operated only intermittently.

20. The original bond was renewed in 1983 at the request of Challenge Venture, Inc. By its terms the new bond expired on August 3, 1988.

21. The letter of credit expired in 1988, and was not renewed. The 1978 operating plan lapsed with the expiration of the bond in 1988. Since operations at the mill site consisted only of limited maintenance and stockpiling and the Forest Service was involved in other more pressing disputes with Plaintiff over grazing issues, no further action was taken on the bond or operating plan.

22. No letter of approval of the modified operations was ever issued by the Forest Service nor was there ever any agreement after 1988 to accept the existing bond or to waive bonding for the modified operations.

23. In 1992 and early 1993, Plaintiff prepared to undertake substantial milling activities at the Challenge Mill facility.

24. John Baldwin became District Ranger of the Glenwood District in February 1992.

25. In the summer of 1993, Tom Dwyer, a new lands and minerals staff person in the Glenwood District, reviewed the Forest Service file and could find no current operating plan and discovered Plaintiff's bond had expired. Mr. Dwyer informed District Ranger Baldwin of these deficiencies.

26. After several unsuccessful attempts to obtain information about the status of the operating plan for the mill site from Plaintiff, visiting the site and seeing its condition, and discussing his options with other specialists within the Forest Service, Mr. Baldwin issued Plaintiff a notice of non-compliance. Because of his concerns about potential harm to the environment and Plaintiff's lack of compliance in the past, Mr. Baldwin decided to prohibit further operations until the conditions upon which the notice of non-compliance was based were satisfied.

27. The notice of non-compliance required four actions by Plaintiff: 1) filing a current plan of operations, 2) providing a state ground water discharge plan or other evidence that he was in compliance with New Mexico law, 3) filing a statement of suspension of operations under Forest Service regulations during periods of non-operations, and 4) providing a reclamation plan and the information needed to determine a reclamation bond.

28. District Ranger Baldwin informed Plaintiff that the prior bond was grossly inadequate and needed to be much higher. District Ranger Baldwin was willing to sit down and negotiate the appropriate amount with Plaintiff. However, within days, Plaintiff unilaterally submitted a new $5,000 letter of credit District Ranger Baldwin never accepted this bond and eventually returned it to Plaintiff.

29. In addition to unilaterally filing a $5,000 letter of credit, Plaintiff also furnished copies of the 1985 correspondence with former Ranger Garland and asserted these letters proved Plaintiff had an approved plan of operations through the year 2000. In order to avoid further acrimony, Mr. Baldwin offered to accept the 1985 information as part of a modified plan but only if the other concerns in the notice of non-compliance

were satisfied (*i.e.*, meeting all state requirements, providing a reclamation plan and new bond adequate to cover that reclamation work).

30. At the time of trial Plaintiff's expert, Dr. Mansker, testified Plaintiff has negotiated extensively with the state but no final state permits have been issued. Plaintiff also provided the Forest Service a generalized bid to perform site reclamation but never provided the detailed information necessary to develop a reclamation plan.

Conclusions of Law

1. This Court has jurisdiction pursuant to the Fourth Amendment of the United States Constitution and 28 U.S.C. §§ 1331, 1343, 1345, and 1346.

2. The United States as fee owner of unpatented claims retains paramount rights and interests in the land and has the authority to regulate the use of that land until a patent issues. *Skaw v. United Stares,* 13 Cl. Ct. 7, 27 (1987) (and cases cited therein).

3. The United States may regulate mining activities in the National Forests. *Id.*; *United States v. Weiss,* 642 F.2d 296 (9th Cir. 1981).

4. The Multiple Use Mining Act of 1955 reserved to the United States the right to manage the surface resources of unpatented claims under the mining laws. 30 U.S.C. § 612(b); *United States v. Doremus,* 888 F.2d 630 (9th Cir. 1989), *cert. denied,* 498 U.S. 1046 (1991); *United States v. Brunskill,* 792 F.2d 938 (9th Cir. 1986).

5. The regulations promulgated by the Forest Service under the Multiple Use Mining Act require the approval by the authorized Forest Service officer of an

operating plan. 36 C.F.R. § 228.5. The plan must include plans for reclamation of the surface, including a bond to cover reclamation costs "when required by the authorized officer." 36 C.F.R. § 228.8(g), 228.13(a).

6. The public interest in these lands requires that Plaintiff post a bond adequate to cover the clean-up costs of mining and milling on public land. *Thomas v. Morton,* 408 F. Supp. 1361, 1370 (D. Ariz. 1976), *aff'd,* 552 F.2d 871 (9th Cir. 1977).

7. The regulations concerning bonding impose the requirement of "maintaining" a sufficient cash bond on the operator, not the Forest Service. 36 C.F.R. § 228.13. The Forest Service's regulations further provide upon approval of any modified plan of operations that: " . . . the authorized officer will review the initial bond for adequacy and, if necessary, will adjust the bond to conform to the operations plan as amended." 36 C.F.R. § 228.13(c).

8. The Forest Service has adopted guidelines for interpretation of its mining regulations in the Forest Service Manual. The Forest Service Manual provisions on mining claims place the obligation on the operator to maintain the bond at all times: "Whenever a bond furnished under an approved plan of operations shall be found unsatisfactory, a new bond that is satisfactory must be furnished within 15 days from the date the operator is notified that the bond in question is not satisfactory." FSM, § 2817.24. The Forest Service Manual expresses the custom and practice of the agency. *Stone Forest Indus., Inc. v. United States,* 973 F.2d 1548, 1551 (Fed. Cir. 1992). An agency's interpretation of its own regulations is generally entitled to deference. *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

9. Plaintiff was required to post a bond sufficient to cover reclamation costs and to maintain an adequate

bond. Subsequent to at least 1988, Plaintiff failed to meet this requirement.

10. The Forest Service regulations also require Plaintiff to comply with all federal and state environmental standards including air quality, water quality, solid waste disposal, protection of scenic values and fisheries and wildlife habitat. 37 C.F.R. § 228.8. The Forest Service regulations also require the operator to furnish information during any periods of temporary cessation of operations. 36 C.F.R. § 228.10.

11. Plaintiff has failed to establish that any formal approval of a modified plan of operations was ever issued by the Forest Service after the mill was convened to the flotation process and expanded in 1983-1985.

12. While the Forest Service could have been far more diligent in compelling Plaintiff to comply with its regulations, inaction does not constitute waiver or estoppel against the United States in the administration of the public's lands. *United States v. California*, 332 U.S. 19, 40 (1947); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 502 U.S. 821 (1991); *Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991). And in substantial part, Plaintiff's continuing violations were caused by his unwillingness to cooperate with federal and state officials.

13. The Forest Service cannot effectively monitor mining and mill site claims if it is prohibited from entering unpatented claims without the applicant's permission. Since the United States holds legal title to such land, it is also not legally required to receive the applicant's permission to go on the surface of such claims. *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994); *United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985);

United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980).

14. In this regard, a mill site claim is not legally distinguishable from a mining claim. *United States v. Shumway*, Civ. 95-0024-Phx-SMM (D. Ariz. 5-30-96) appeal pending.

15. Forest Service personnel were therefore entitled to enter the surface of the mill site and carry out official inspections for legitimate governmental purposes and permit New Mexico officials to do likewise.

16. In the present case, neither federal nor state officials entered any locked buildings or exceeded the scope of their authority in entering the mill site in an attempt to assess the potential environmental impact of Plaintiff's operations.

17. Plaintiff is denied relief under his complaint and his reply counterclaim. Judgment will be entered for the United States for the relief requested in its counterclaim.

A judgment in accordance with these findings of fact and conclusions of law shall be entered.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD MANNING,

Plaintiff,

v. No. CIV 95-19 BB/LCS

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

(Filed Aug. 29, 1996)

THIS MATTER having come on for a trial to the Court without a jury on July 29, 30, and 31, 1996, and the Court now having made its findings of fact and conclusions of law;

Now, therefore,

IT IS ORDERED that judgment is awarded in favor of Defendant United States of America; that Plaintiff Richard Manning take nothing by his complaint and reply counterclaim; that the complaint is dismissed; and that Defendant United States of America recover its costs herein.

DATED at Albuquerque this 28th day of August, 1996.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge